IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No 78-6809

RECEIVED
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SUPREME COURT, U.S.

DENNIS SEAY JENKINS, Petitioner

VS

CHARLES ANDERSON, Warden State Prison for Southern Michigan at Jackson, Michigan,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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AUTHORITIES CITED

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DENNIS SEAY JENKINS, Petitioner

VS

CHARLES ANDERSON, Warden, State Prison for Southern Michigan at Jackson, Michigan,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE SIXTH CIRCUIT

Dennis Seay Jenkins, petitioner, by his attorney, Carl Ziemba, respectfully prays this Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in the case of Dennis Seay Jenkins, petitioner, vs Charles Anderson, warden, State Prison for Southern Michigan at Jackson, Michigan, to review the Order entered in No 79 1011 dated May 4, 1979 affirming the judgment of the District Court which denied petitioner a writ of habeas corpus.

ORDERS BELOW

The Court of Appeals did not issue an opinion. The Order of the Court of Appeals dated May 4, 1979 affirming the judgment of the District Court which denied petitioner a writ of habeas corpus is unpublished; it is appended hereto as Appendix 'A'.

The Order of the Court of Appeals dated May 29, 1979 denying a rehearing to petitioner is unpublished; it is appended hereto as Appendix 'B'.

STATEMENT OF JURISDICTION

The Order of the Court of Appeals affirming the judgment of the district court which denied petitioner a writ of habeas corpus was entered May 4, 1979. Petitioner's motion for rehearing was denied by Order dated May 29, 1979.

The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

'danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.'

QUESTION PRESENTED

Whether consistent with the Fifth Amendment to the United States Constitution a defendant in a state criminal prosecution can be cross-examined concerning his failure to go to the police at a time before his arrest and give the same explanation of self-defense which he gave in testimony on trial.

STATEMENT OF PERTINENT FACTS

Petitioner was charged in a one count information in the Recorder's Court for the City of Detroit, Michigan with the commission of the offense of murder of the first degree in the stabbing death of the victim.

Testimony was adduced reflecting that there was a confrontation on the street between petitioner and the deceased, a struggle ensued, the victim was stabbed in the chest and subsequently died, and petitioner ran away.

A period of two weeks elapsed between the date of the stabbing and the arrest of petitioner. Petitioner surrendered to the police knowing that a warrant for his arrest was outstanding.

Petitioner took the stand in his own defense and on direct examination testified that he had acted in self-defense. On cross-examination, the prosecutor asked petitioner whether he had during the two week period between the stabbing and his arrest 'go[ne] to a Police Officer or to anyone else' and 'reported the things that you have told us in Court today' and also the prosecutor asked petitioner '[w]hen was the first time that you reported the things that you have told us in Court today to anybody'.

In argument to the jury the prosecutor adverted to the fact that petitioner 'waited two weeks . . . before he did anything about surrendering himself or reporting it to anybody'.

Petitioner called two witnesses to support his claim that he had acted in self-defense. On cross-examination of these two witnesses, the prosecutor asked whether they had gone to the police prior to trial to tell the police that petitioner had acted in self-defense; the answers, of course, were that they had not. And in argument to the jury, the prosecutor adverted to the fact that the two witnesses had not gone to the police to tell them that defendant had acted in self-defense.

The jury convicted petitioner of manslaughter; the court sentenced petitioner to a term of 10 years to 15 years. Petitioner remains at date hereof incarcerated in State Prison for Southern Michigan at Jackson, Michigan, Charles Anderson, warden.

The Michigan Court of Appeals affirmed petitioner's conviction on the prosecutor's motion to affirm, and the Michigan Supreme Court denied a discretionary appeal.

Petitioner sought a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, Southern Division; a judgment entered denying the petition for writ of habeas corpus.

Petitioner appealed said denial to the United States Court of Appeals for the Sixth Circuit. By Order, the judgment of the lower court was affirmed.

REASONS FOR GRANTING THE WRIT

The Court of Appeals declined to apply the principle of Doyle v Ohio, 426 US 610 (1976) in the case at bar because the silence about which petitioner was cross-examined was silence adhered to while petitioner was not under arrest. This is what the Court of Appeals said:

> 'The most serious issue raised by petitioner is whether cross-examination as to his silence concerning his defense amounts to a violation of his privilege against self-incrimination as construed in Doyle v. Ohio, 426 U.S. 610 (1976). It appears, however, that unlike the circumstances in Doyle, the petitioner was not questioned concerning his silence while under arrest or otherwise in custody. The petitioner does not complain that his silence was the product of the implicit assurance of Miranda warnings that silence carries no penalty. Doyle, supra, 426 U.S. at 618. We find such a claim foreclosed by our decision in Bradley v. Jago, No. 78-3236, decided and filed March 27, 1979.' [pp2-3, Order].

In Bradley v Jago, 594 F2d 1100, 1103 (CA6 1979), a habeas corpus proceeding out of a state-court conviction, the Court held as follows:

> 'We do not read Doyle to prohibit an attempt to impeach a defendant by cross-examination concerning his failure to offer an exculpatory explanation when the opportunity to do so came before he was in custody and before he had received any advice of his right to remain silent.
>
> * * *
>
> 'Doyle applies to those situations in which a defendant is entitled to rely on the implicit assurance of the Miranda warnings that silence carries no penalty. 426 U.S. at 618. In contrast, where a defendant has not received warnings, there is nothing unfair in permitting jurors to hear that a defendant initially failed to offer his exculpatory version of events after they have heard his version at trial. It is not to be presumed that failure to explain at that ime resulted from an exercise of the Fifth Amendment right to remain silent. The fact that the defendant did not offer the exculpatory explanation when he had an earlier opportunity to do so is evidence which the jury is entitled to hear, and from which it may draw reasonable inferences.'

Thus, the issue is clearly drawn: Does the Fifth Amendment right to silence spring into being only when some police authority informs the defendant that the Fifth Amendment confers upon him the right to remain silent?

The distinction between silence occurring prior to and silence occurring after Miranda warnings has been rejected by three circuits: United States v Impson, 531 F2d 274 (CA5 1976); United States v Henderson, 565 F2d 900 (CA5 1978); United States ex rel Allen v Rowe, 591 F2d 391 (CA7 1979); Bradford v Stone, 594 F2d 1294 (CA9 1979).

There is good reason to reject a distinction between

silence occurring prior to and silence occurring after Miranda warnings. Not to do so would lead to the establishment of the startling principle that an accused under arrest and in custody has greater and better constitutional rights than an accused not under arrest and not in custody.

Before Miranda saw the light of day, an accused had the right to remain silent in the face of questioning whether in custody of the police or not.

Miranda merely requires the police to inform and advise an accused who is in custody of certain rights which the Constitution of the United States grants him. Miranda created no new constitutional rights.

Rights created by the United States Constitution inure to the benefit of all, not only to those who have been arrested.

An accused under arrest and in custody may have the judicially created right to have the police advise him of his Miranda rights, whereas an accused not in custody of the police does not have the right to have the police advise him of his Miranda rights. But this does not mean that the accused who is not in custody does not have the same constitutional rights as does the accused who is in custody. Each has the right under the Fifth Amendment to remain silent and make no statement in the face of accusation of commission of crime.

Any person accused of crime, whether he be in custody or not, has a right under the Sixth Amendment to the United States Constitution to consult with an attorney. Under Miranda, an accused in custody must be advised of the fact that he has this right to consult with an attorney by his custodians. But this does not mean that the accused who is in custody has a better or a different right to consult with an attorney than an accused who is not in custody. Both have the same constitutional right and the substance of that right in both instances is the same.

Certainly, an accused who was advised by the police while he was in custody that he had a right to consult with an attorney and who exercised that right could not on trial be cross-examined by the prosecutor on the fact that while in custody and in the face of proposed questioning by the police he asked to be permitted to consult with an attorney.

Nor could a defendant be impeached on trial by the fact that he had consulted with an attorney before his arrest. Thus, in United States ex rel Macon v Yeager, 476 F2d 613 (CA3 1972), the defendant, on the morning after the homicide, and before his arrest, called his attorney. The prosecutor on trial in argument to the jury suggested that defendant's calling his attorney was not the act of an innocent man. The Court found that this suggestion was an impermissible infringement of the defendant's constitutional right to assistance of counsel. Se also: Zemina v Solem, 573 F2d 1027 (CA8 1978).

There is quintessentially no difference between the constitutional right to assistance of counsel and the constitutional right to silence which makes exercise by an accused of silence before arrest fair game for impeachment but exercise of the right to assistance of counsel before arrest not.

The reasonings and rationale of the Fifth, Seventh and Ninth Circuit Courts of Appeal, it is respectfully urged, is sounder that that of the Sixth Circuit because

a principle of law that establishes that a person accused of crime who is arrested immediately after the fact, by virtue of that fortuitous circumstance, has the constitutional privilege of withholding from the police the defense he intends to advance on trial but that another person, accused of perhaps the same crime, who is not arrested for that crime until some time after the fact, has an obligation to seek out the police and explain to them the defense he intends to advance on trial under penalty of being damned on trial by his failure to do so, verges on the philosophically absurd and is for that reason untenable and should be rejected.

CONCLUSION

It is respectfully submitted that for the reasons above given, the Order of the Court of Appeals for the Sixth Circuit affirming the judgment of the district court which denied petitioner a writ of habeas corpus is in conflict with the requirements of the Fifth Amendment to the United States Constitution and petitioner's request for a Writ of Certiorari should be granted.

Respectfully submitted,

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Detroit, Michigan
June 4, 1979

FILED
MAY 4 1979
JOHN P. HEHMAN, Clerk

79-1011

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS SEAY JENKINS,

Petitioner-Appellant

V.

CHARLES ANDERSON, Warden,

Respondent-Appellee

O R D E R

Before: LIVELY and ENGEL, Circuit Judges and PHILLIPS, Senior Circuit Judge.

Petitioner Dennis Seay Jenkins was convicted in the Recorder's Court of Detroit, Michigan, of manslaughter in the death of one Doyle Redding on August 13, 1974. Having exhausted his state remedies, he filed a petition for writ of habeas corpus in the district court, and having been denied relief there, appeals.

As grounds for relief, Jenkins asserts four alleged deprivations of his rights under the United States Constitution:

1. that he was deprived of his right under the Fifth and Fourteenth Amendments to a fair trial when the prosecutor cross-examined him and the witnesses testifying in his behalf by asking why they did not go to the police and tell them the story of self-defense which they gave at trial;

2. that he was deprived of a fair trial under the

Fourteenth Amendment when the prosecutor accused him of "trafficking" in narcotics;

3. that he was deprived of his right under the Fourteenth Amendment when the trial court accepted a verdict of guilty after purportedly declaring a mistrial, and

4. that he was deprived of his right under the Sixth and Fourteenth Amendments of the United States Constitution to the effective assistance of counsel on trial and on his appeal of right to the Michigan Court of Appeals.

Upon a review of the record, the court is satisfied that none of the contentions has merit.

The most serious issue raised by petitioner is whether cross-examination as to his original silence concerning his defense amounts to a violation of his privilege against self-incrimination as construed in Doyle v. Ohio, 426 U.S. 610 (1976). It appears, however, that unlike the circumstances in Doyle, the petitioner was not questioned concerning his silence while under arrest or otherwise in custody. The petitioner does not complain that his silence was the product of the implicit assurance of Miranda warnings that silence carries no penalty. Doyle, supra, 426 U.S. at 618. We find such a claim foreclosed

by our decision in Bradley v. Jago, No. 78-3236, decided and filed March 27, 1979. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

79-1011

FILED

MAY 29 1979

JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS SEAY JENKINS,

Petitioner-Appellant

V.

CHARLES ANDERSON, Warden

Respondent-Appellee

O R D E R

Before: LIVELY and ENGEL, Circuit Judges and PHILLIPS, Senior Circuit Judge

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the petitioner-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that no issues are raised which have not been previously considered by this court. Accordingly,

IT IS ORDERED that the petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

Supreme Court, U. S.
FILED
OCT 16 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6809

DENNIS SEAY JENKINS,
Petitioner

—*v.*—

CHARLES ANDERSON, Warden, State Prison for Southern Michigan at Jackson, Michigan,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 7, 1979
CERTIORARI GRANTED OCTOBER 1, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6809

DENNIS SEAY JENKINS,

Petitioner

—*v.*—

CHARLES ANDERSON, Warden, State Prison for Southern Michigan at Jackson, Michigan,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

No. 77-72690

DENNIS JENKINS, PLAINTIFF

v.

CHARLES ANDERSON, WARDEN, DEFENDANT

DOCKET ENTRIES

1977

Nov. 11 Petition for Writ of Habeas Corpus, filed. DD 11-14-77

Nov. 22 Order requiring filing of responsive pleadings by Jan 18/78. DD 11/23/77 Komives, M

Nov. 21 Attachment of Pltf for denials for Habeas Corpus with proof of service. DD 11/25/77

Dec. 21 Ptf's motion for leave to proceed forma pauperis, motion for ordering State Court Record, application for bail pending ruling on pet. for writ of Habeas corpus, affidavit, proof of service, notice of hearing set for Jan 9/78 dd 12/29/77

1978

Jan. 31 Plaintiff's motion for judgment by default with affidavit and proof of service. DD 1/31/78.

Mar. 7 Appearance of Attorney William Molner on behalf of deft. DD 3/7/78

Mar. 7 Deft's Motion for enlargement of time to answer with BA and affidavit. DD 3/7/78

Mar. 7 Deft's Answer in opposition to Motion for Bond pending Federal Habeas Corpus Review with BA. DD 3/7/78

1978

Mar. 7 Proof of service re; Deft's Answer in opposition to Motion for Bond pending Habeas Corpus review with BA; Motion for enlargement of time to answer with BA; and Appearance. DD 3/7/78

Mar. 15 Pltf's Demand for Judgment FRCP 54(c)(b) with proof of service. DD 3/15/78

Mar. 16 Pltf's Motion to strike with BA and Notice of hearing set for March 27/78 with proof of service. DD 3/17/78

Mar. 17 Order granting motion for enlargement of time for respondent's to file responsive pleadings to and including March 20/78 with certificate of service. DD 3/20/78. Komives, M.

Mar. 20 Order denying demand for judgment, request for default and Judgment for default. DD 3/22/78 Komives M

Mar. 20 Proof of mailing re: Order denying demand for judgment, request for default and judgment of default. DD 3/22/78

Mar. 22 Deft's Notice of filing transcript and Motion to dismiss and alternative Motion for Summary Judgment with Affidavit and BA; proof of service, Transcript attached. DD 3/22/78

Apr. 28 Pltf's Affidavit of Bias and/or Motion to disqualify with Notice of hearing set for May 8/78 with proof of service. DD 4/28/78

May 11 Notice of hearing on motion to dismiss, disqualify and to strike for June 5/78. DD 5/11/78.

May 11 Appointment of counsel for Petitioner Dennis Jenkins. DD 5/11/78. (Ziemba) Komives, M

1978

June 5 Case called. Carl Ziemba present for petitioner. Asst. Attorney General John Mack present for respondent. Petitioner asked that his motion to disqualify and his motion to strike be withdrawn. There being no objection it was so ordered. Petitioner asked that the motion to dismiss be adjourned to June 27/28 at 10:00 A.M. There being no objection, it was so ordered. Petitioner is given leave to file an amended petition and a brief in support of his petition. DD 6/6/78. Komives, M.

June 7 Notice of hearing on motion to dismiss for June 27/78. DD 6/8/78.

June 7 Substitution of attorneys for respondent. DD 6/8/78.

June 7 Proof of service on substitution of attorneys. DD 6/8/78.

June 23 Proof of service re: Respondents Answer to Pltf's Motion for Summary Judgment w/BA and Substitution of Attorneys. DD 6/23/78

June 23 Substitution of Attorneys for the deft: (SUB: John Mack Asst Atty General) DD 6/23/78

June 23 Deft's Answer to Petitioner's Motion for Summary Judgment with BA. DD 6/23/78

Aug. 16 Magistrate's report and recommendation. DD 8/17/78. Komives, M.

Aug. 18 Petitioner's Objections to Report and Recommendations of Magistrate.

Aug. 18 Certificate of Service re: Petitioner's Objections to Report and Recommendation of Magistrate. DD 8/21/78

Nov. 9 Letter to Pltf re: Deft's Attorney request Pltf's Atty to bring stipulation and motions. DD 11/9/78

Nov. 13 Order of Dismissal of action by granting Deft's Motion to dismiss. DD 11/14/78 Pratt J

Nov. 13 JUDGMENT dismissing action. DD 11/14/78 Pratt, J (cards mailed)

1978

Nov. 13 Proof of mailing re: Order of Dismissal and Judgment. DD 11/14/78

Nov. 15 Ptfs' notice of appeal. DD 11/16/78

Nov. 15 Request for compliance with Rule 22(b). Federal Rules of Appellate Procedure. DD 11/16/78

Nov. 17 Letter to Atty re: Notice of Appeal. DD 11/20/78

Nov. 17 Proof of mailing re: Notice of Appeal. DD 11/20/78

Nov. 21 Certificate of Probable Cause with proof of mailing. DD 11/22/78 Pratt J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
Detroit

Michigan Supreme Court #58452

Court of Appeals #22715

Recorder's Court #74-06322

DENNIS JENKINS, PETITIONER

—*vs.*—

CHARLES ANDERSON, Warden
State Prison of Southern Michigan, RESPONDENT

DENNIS JENKINS, PROPRIA PERSONA

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE, THE JUDGES OF SAID COURT:

The Petition of DENNIS JENKINS respectfully represents:

1. That your Petitioner is now illegally imprisoned by CHARLES ANDERSON, Warden of State Prison of Southern Michigan and such prison is located within the jurisdiction of this COURT.

2. That the cause or pretense of said imprisonment, according to the best knowledge and belief of your Petitioner is, conviction of Manslaughter in Recorder's Court at Detroit on November 7, 1974, and subsequent sentence given on November 12, 1974. (SEE "Exhibit A").

3. That said imprisonment is illegal and unlawful, in that the conviction was obtained in violation of rights guaranteed Petitioner by the FIFTH, SIXTH, and FOURTEENTH AMENDMENTS of the Constitution of the United States and such violations are as follows:

(a) That the Prosecutor violated Petitioner's right of Fifth Amendment by questioning Petitioner as to why he remained silent when first arrested and why he did not tell the police the story just related to Jury and FURTHER argued in his summation to Jury that Petitioner, then defendant, should be convicted because he had remained silent when first arrested and had failed to talk to the police about the alleged crime.

(b) Petitioner was denied a fair trial and due process of law when the Prosecutor argued to the Jury that the homicide, *in his personal opinion*, was the result of a narcotic transaction; but no such logical inference could have been drawn from the evidence presented and the Prosecutor became an unsworn witness against your Petitioner who could not face and cross examine this accusor and such denied your Petitioner confrontation guaranteed by the Sixth Amendment.

(c) Petitioner was denied 'due process' of law and a fair trial when the Court refused to read, upon the request of Jury, certain testimony that went to the crux of the offense even though Jury had deliberated on November 1, 4, 6, and 7, primarily in half-day sessions and Michigan law demanded that the testimony to read upon request. Such denied Petitioner procedural due process and a fair trial in violation of the Fourteenth Amendment of the Constitution.

(d) Petitioner was denied the effective assistance of counsel in the trial court, the Court of Appeals, and the Michigan Supreme Court because court-appointed counsels never objected nor briefed any of the issues *now raised.* Petitioner, a layman at law, has never had any of the issues now being presented briefed by learned counsel merely because of poverty. Petitioner proceeded alone in the Supreme Court and that Court refused to appoint counsel to aid Petitioner and, Petitioner acting propria persona, was forced to brief said issues in both the Court of Appeals and the Michigan Supreme Court. The Michigan Constitution guarantees counsel for indigents in the appellate process but said counsel filed a pro forma brief in the Court of Appeals.

By reasons whereof, your Petitioner prays that a writ of habeas corpus may forthwith issue to inquire into the cause of his unlawful imprisonment and upon the hearing thereon, your Petitioner may be discharged therefrom by ORDER of this Honorable COURT.

DATED: November 2, 1977

Respectfully submitted

/s/ Dennis Seay Jenkins
Propria Persona

AFFIDAVIT

STATE OF MICHIGAN)
) ss.
COUNTY OF JACKSON)

On this 2-3-77, before me, the undersigned, a notary public in and for said county, personally came the abovenamed DENNIS JENKINS, who subscribed the foregoing petition, who being by me duly sworn says that he has read the said petition and knows the contents thereof, and that the same is true of his own personal knowledge, except as those matters therein stated to be upon his information and belief, and as to those matters he believes to be true.

/s/ Betty J. Scott
Notary Public

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 7-72690

DENNIS SEAY JENKINS, PETITIONER

vs.

CHARLES ANDERSON, Warden,
State Prison of Southern Michigan, RESPONDENT

MAGISTRATE'S REPORT AND
RECOMMENDATION—August 16, 1978

I. RECOMMENDATION

It is recommended that the Respondent's Motion to Dismiss be granted and that the Petitioner's Application for a Writ of Habeas Corpus be denied.

II. REPORT

Petitioner, Dennis Seay Jenkins, was convicted in the Detroit Recorder's Court of manslaughter on November 20, 1974. He was subsequently sentenced to a term of imprisonment from 10 to 15 years and is presently incarcerated under the jurisdiction of the Michigan Department of Corrections at the State Prison of Southern Michigan, Jackson, Michigan. Petitioner applied to Federal Court for relief after exhausting his state remedies.

Petitioner raises four issues. It is alleged that Petitioner was deprived of his Fifth and Fourteenth Amendment rights when the prosecutor impeached the Petitioner on cross-examination with the fact that he did not go to the police and tell the story of self defense which Petitioner gave on trial; that Petitioner was deprived of his Fourteenth Amendment right to a fair trial when the Prosecutor, in his closing argument, told the jury he

thought the situation involved grew out of "narcotics trafficking;" that Petitioner was deprived of his right to due process of the law when the trial court accepted a verdict of guilty from the jury after the trial court had stated its intention to declare a mistrial; that Petitioner was deprived of his Sixth Amendment right to effective assistance of trial and appellate counsel.

Petitioner first alleges that he was deprived of his right under the Fifth Amendment to the United States Constitution not to incriminate himself and of his right under the Fourteenth Amendment to a fair trial when the prosecution impeached the Petitioner on cross-examination with the fact that he did not go to the police and tell them the story of self-defense which Petitioner gave on trial (Petitioner's Brief, p. 7). Petitioner bases his claim on the following colloquy, which occurred after Petitioner testified that he had acted in self-defense.

> "Q [By Prosecutor]: And I suppose you waited for the police to tell them what happened?
>
> A No, I didn't.
>
> Q You didn't?
>
> Q I see. And how long was it after this day that you were arrested, or that you were taken into custody? (Tr. 296)

After a date was established, the prosecutor asked the following questions:

> "Q [By Prosecutor] (Interposing) When was the first time you reported the things that you have told us in Court today to anybody?
>
> A Two days after it happened.
>
> Q And who did you report it to?
>
> A To my probation officer.
>
> Q Well, apart from him.
>
> A No one.

Q Who?

A No one but my—

Q (Interposing) Did you ever go to a Police Officer or to anyone else? (Tr. 297).

A No, I didn't." (Tr. 298).

Petitioner also bases his claim on remarks the prosecutor made to the jury in his final argument, which follow:

> "Now he waited two weeks, according to the testimony—at least two weeks before he did anything about surrounding himself or reporting it to anybody. And then, after two weeks, he pulled the grand stand stunt of surrendering himself to the mayor, because he claimed he was afraid." (Tr. 311)
>
> * * * *
>
> "I would suggest to you that he waited two weeks before he surrendered himself because he did it after he had lined up all those witnesses." (Tr. 312) [There was an objection; overruled]

In *Doyle* v. *Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976), the United States Supreme Court held that the use for impeachment purposes of Petitioner's silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment. The theory of the *Doyle* decision is that the *Miranda* warnings implicitly assure the arrested person that his silence will carry no penalty; and, hence, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. (426 U.S. at 618).

The Court in *Doyle* stated that, if raised, the harmless error rule may be applicable to the circumstances of the case (426 U.S. at 619-20). Federal decisions subsequent to *Doyle* have found prosecutional comment on post-arrest silence to be harmless in several instances, especially where the comment was not prolonged or addressed in closing argument. *See Hayton* v. *Egeler*, 555

F.2d 599 (6th Cir. 1977); *Moore* v. *Cowan*, 560 F.2d 1298 (6th Cir. 1977); *Jones* v. *Wyrick*, 542 F.2d 1013 (8th Cir. 1976); *Meeks* v. *Havener*, 545 F.2d 9 (6th Cir. 1976); *Chapman* v. *U.S.*, 547 F.2d 1240 (5th Cir. 1977).

In the present case, the prosecutor attempted to impeach the Petitioner with evidence of pre-arrest silence. *Doyle* dealt with the issue of post-arrest, post-*Miranda* warnings silence. Construed narrowly, *Doyle* does not stand for the proposition that the use of pre-arrest silence for impeachment purposes constitutes constitutional error. A review of the case law in the area does not reveal any cases which hold that the use of pre-arrest silence for impeachment purposes is constitutional error. Also, the use of pre-arrest silence is distinguishable from the use of post-arrest silence because with pre-arrest silence, there is no reliance on the *Miranda* warnings that the silence will carry no penalty (*See* 426 U.S. at 618). Therefore, none of the "fundamental unfairness" found to exist in *Doyle* is present. I suggest that the use of Petitioner's pre-arrest silence to impeach his credibility did not constitute constitutional error.

Petitioner had the right to remain silent, but when he took the stand to testify, the prosecutor had the right to try to impeach his credibility. The comments regarding the Petitioner's pre-arrest silence went to the issue of his credibility in asserting self-defense. A review of the trial transcript indicates that it is over 300 pages long. In relation to the length of the trial, the prosecutor's comments regarding Petitioner's failure to report his version of the facts to anyone for over two weeks were not extensive or prolonged. Therefore, I suggest that Petitioner's first claim is without merit.

Petitioner next alleges that he was deprived of his Fourteenth Amendment right to a fair trial when the prosecutor accused him of "trafficking in narcotics" in the closing argument (Petitioner's Brief, p. 18). In argument to the jury, the prosecutor told them the following:

> "Now he [Ronald Connor, prosecution witness] admitted all this. He told you that he robbed Willie

> Brunner and took not only money, but some narcotics from him. Now I suggest that the testimony indicates that there was some kind of connection between Mr. Brunner and the Defendant which resulted in the Defendant going out looking later on that day for the deceased, with the intention that he had formulated in his mind that when he found him, he was going to do something about it, *and to put it very bluntly, flat out, I think this was a part and parcel of a narcotics trafficking, and it grew out of it, and was part of the circumstances that are involved in this type of traffic.*" (T306) [Emphasis added.]

The scope of review of a petition for a writ of habeas corpus by a federal court is a "narrow one of due process and not the broad exercise of supervisory power that it would possess in regard to its own trial court." *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). This is important because not every trial error which might call for application of supervisory powers correspondingly constitutes a "failure to observe that fundamental fairness essential to the very concept of justice." *Donnelly, supra*, 416 U.S. at 642 citing *Lisenba* v. *California*, 314 U.S. 219, 236 (1941).

Petitioner does not allege that he has been denied the benefit of a specific provision of the Bill of Rights. Instead, his claim is that the prosecutor introduced such prejudicial material into the case during the closing argument that the trial was suddenly infected with unfairness making the resulting conviction a denial of due process.

I suggest that Petitioner's claim is without merit. In *United States* v. *Leon*, 534 F.2d 667, 679 (6th Cir. 1976), the Court set forth a test to review prosecutorial misconduct:

> "In every case, we consider the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they were isolated or extensive, whether they were deliberately or accidently placed before the jury, and the strength of the competent proofs introduced to establish the guilt of the accused."

In the present case, the prosecutor made one isolated reference to "narcotics trafficking". While the remark was capable of the inference that Petitioner was dealing in narcotics, the prosecutor did not pursue that line of argument. The remark was not totally without basis in evidence. Petitioner testified that he had previously been convicted of unlawful use of heroin. Also, a witness testified that he had robbed persons in the company of Petitioner of money and "dope." Because the prosecutor's remark was ambiguous, was an isolated reference, and there is no evidence that it was deliberate or calculated, the remark did not make Petitioner's trial so fundamentally unfair as to deny him due process.

Petitioner also alleges that he was deprived of his Fourteenth Amendment right to due process when the trial court accepted a verdict of guilty after it had declared a mistrial. (Petitioner's Brief, pp. 23-25). He bases this contention on the following colloquy:

> "THE COURT: All right. Case Number 74-06322, People of the State of Michigan versus Dennis Jenkins. The record should indicate that the Jury has been deliberating since Thursday of last week—Which was?
>
> COURT CLERK: October Thirty-First.
>
> THE COURT: (Continuing) The Thirty-First of October. Although, the deliberations were for approximately one hour and a half that date. The Jury deliberated Friday the First of November, the Jury deliberated Monday, the Fourth of November, the Jury deliberated Wednesday, the Sixth of November, and the Jury has deliberated half a day today, the Seventh of November. The Court is of the opinion that the Jury is going to be unable to reach a decision, and is going to declare a mistrial. Counsel wants to be heard? (T364)

MR. RUTLEDGE [defendant's counsel]: No, Your Honor.

MR. WEISWASSER [prosecutor]: I think the facts are self-evident.

THE COURT: Yes, I think so. All right. The mistrial will be ordered, and Mr. Ware [court clerk] will set a new trial date. Bring the Jury out. (T 365)" (Tr. 365).

* * * *

"THE COURT: All right. Who is the Foreman of the Jury?

JUROR SEAT NO. 6: I am.

THE COURT: Stand up, please.

JUROR SEAT NO. 6: (Indicating)

THE COURT: Has the Jury reached a verdict? (T365)

JUROR SEAT NO. 6: Yes, sir, Your Honor.

THE COURT: The Jury has reached a verdict?

JUROR SEAT NO. 6: Yes, sir.

THE COURT: When did you reach your verdict?

JUROR SEAT NO. 6: Just a few minutes ago.

THE COURT: Where is Mr. Ware?

COURT CLERK: (Indicating)

THE COURT: The Jury has reached a verdict. Take the verdict. (T366)" (Tr. 366).

It is important to note that the trial judge did not state his intention to declare a mistrial in front of the jury before they rendered their verdict. Also, there was no further deliberation after the trial judge told counsel of his intention and before the rendering of the verdict. The Constitution does not, I suggest, contain any provision forbidding a state trial court from following

the common sense approach as was done in the case at bar.

In his final argument, Petitioner alleges that he was deprived of his right under the Sixth Amendment to effective assistance of counsel at trial and on his appeal to the Michigan Court of Appeals. (Petitioner's Brief at p. 31). Specifically, Petitioner alleges that counsel at trial was ineffective because he failed to object (1) to the prosecutor's impeachment of the defendant and defense witness on their pre-trial silence; (2) to the prejudicial argument of the prosecutor that the defendant was a trafficker in narcotics; and (3) to the trial judge's taking of a verdict from the jury after the trial judge had allegedly declared a mistrial. These are the same issues raised by Petitioner in his Petition for Writ of Habeas Corpus and which I suggest are without merit.

The standard for effective assistance of counsel articulated by the Sixth Circuit and adopted by the Michigan Supreme Court (*People* v. *Garcia*, 398 Mich. 250, 266, 247 N.W. 2d 547 (1976)) is as follows:

> "Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interests, undeflected by conflicting considerations." *Beasley* v. *United States*, 497 F.2d 687, 696 (6th Cir. 1974).

The Court went on to hold that "the assistance of counsel under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance." (491 F.2d at 696).

In the present case, it cannot be said that Petitioner did not receive "reasonably effective assistance" at his trial. The objections that defense attorney failed to raise have been found suggested be without merit. Therefore, there is no evidence of prejudice to the Petitioner by the objections not having been made. Also, Petitioner was indicted for first degree murder, but through the assistance of his counsel was able to obtain a reduced conviction of manslaughter. This is evidence that Petitioner received effective assistance of trial counsel.

Petitioner alleges that counsel on appeal was ineffective because he failed to raise the issues of 1) Petitioner's deprivation of Fifth and Fourteenth Amendment Rights because the prosecutor used Petitioner's pre-arrest silence to impeach his self-defense theory; and 2) Petitioner's deprivation of his Fourteenth Amendment Right to a fair trial because the prosecution remarked that Petitioner was involved in narcotics trafficking.

It has been held that where counsel failed to raise various points on appeal, a petitioner is entitled to relief if he had an arguable chance of success with respect to these contentions. *Thor* v. *U.S.*, 574 F.2d 215, 221 (5th Cir. 1978) citing *Hooks* v. *Roberts*, 480 F.2d 1196 (5th Cir. 1973), *cert. denied* 414 U.S. 1163 (1974). If it can be determined that the appeal would have been futile with respect to those errors that counsel failed to raise, then this Petitioner is not entitled to relief (574 F.2d at 222).

The issues now raised by the Petitioner have been suggested to be without merit. Therefore, Petitioner was not denied effective assistance of appellate counsel because he did not raise the issues on appeal.

I therefore recommend that Petitioner's Petition for a Writ of Habeas Corpus be denied.

Respectfully submitted,

/s/ Paul J. Komives
United States Magistrate

Dated: 8/16/78.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 7-72690

DENNIS SEAY JENKINS, PETITIONER

vs.

CHARLES ANDERSON, Warden,
State Prison of Southern Michigan, RESPONDENT

ORDER OF DISMISSAL—November 13, 1978

The Court, in accordance with 28 U.S.C. § 636(b)(1)(C), reviewed the Report and Recommendation of the Magistrate which recommended the dismissal of the plaintiff's petition and the granting of defendant's Motion to Dismiss. The plaintiff then filed timely his objections to that Report and Recommendation, by counsel and in pro per.

The Court has reviewed the files and records in this case, the briefs of counsel and the objections of the plaintiff and is satisfied that the Magistrate's analysis, reasoning and recommendation are correct. It, therefore, adopts the findings and conclusions of the Magistrate.

IT IS ORDERED that the Motion to Dismiss be and the same is hereby granted and that the Petition for Writ of Habeas Corpus be DISMISSED.

/s/ Philip Pratt
PHILIP PRATT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 7-72690

DENNIS SEAY JENKINS, PETITIONER

vs.

CHARLES ANDERSON, Warden,
State Prison of Southern Michigan, RESPONDENT

JUDGMENT

The Court having entered an Order of Dismissal on this date based upon its review of the file and records in this cause and upon the report and recommendation of the Magistrate in accordance with 28 U.S.C. § 636 (b) (1) (C) and after consideration of the objections filed by the plaintiff,

IT IS ADJUDGED that plaintiff be granted no relief and that the action be dismissed in accordance with the Order entered this date.

/s/ Philip Pratt
PHILIP PRATT
United States District Judge

Dated: November 13, 1978
Detroit, Michigan

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 79-1011

DENNIS SEAY JENKINS, PETITIONER-APPELLANT

v.

CHARLES ANDERSON, Warden, RESPONDENT-APPELLEE

Before: LIVELY and ENGEL, Circuit Judges and PHILLIPS, Senior Circuit Judge.

ORDER—Filed May 4, 1979

Petitioner Dennis Seay Jenkins was convicted in the Recorder's Court of Detroit, Michigan, of manslaughter in the death of one Doyle Redding on August 13, 1974. Having exhausted his state remedies, he filed a petition for writ of habeas corpus in the district court, and having been denied relief there, appeals.

As grounds for relief, Jenkins asserts four alleged deprivations of his rights under the United States Constitution:

1. that he was deprived of his right under the Fifth and Fourteenth Amendments to a fair trial when the prosecutor cross-examined him and the witnesses testifying in his behalf by asking why they did not go to the police and tell them the story of self-defense which they gave at trial;
2. that he was deprived of a fair trial under the Fourteenth Amendment when the prosecutor accused him of "trafficking" in narcotics;
3. that he was deprived of his right under the Fourteenth Amendment when the trial court accepted a verdict of guilty after purportedly declaring a mistrial, and

4. that he was deprived of his right under the Sixth and Fourteenth Amendments of the United States Constitution to the effective assistance of counsel on trial and on his appeal of right to the Michigan Court of Appeals.

Upon a review of the record, the court is satisfied that none of the contentions has merit.

The most serious issue raised by petitioner is whether cross-examination as to his original silence concerning the defense amounts to a violation of his privilege against self-incrimination as construed in *Doyle* v. *Ohio*, 426 U.S. 610 (1976). It appears, however, that unlike the circumstances in *Doyle*, the petitioner was not questioned concerning his silence while under arrest or otherwise in custody. The petitioner does not complain that his silence was the product of the implicit assurance of *Miranda* warnings that silence carries no penalty. *Doyle, supra*, 426 U.S. at 618. We find such a claim foreclosed by our decision in *Bradley* v. *Jago*, No. 78-3236, *decided and filed* March 27, 1979. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 79-1011

DENNIS SEAY JENKINS, PETITIONER-APPELLANT

v.

CHARLES ANDERSON, Warden, RESPONDENT-APPELLEE

Before: LIVELY and ENGEL, Circuit Judges and PHILLIPS, Senior Circuit Judge

ORDER—Filed May 29, 1979

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the petitioner-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that no issues are raised which have not been previously considered by this court. Accordingly,

IT IS ORDERED that the petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

[79] EXCERPTS FROM STATE TRIAL TRANSCRIPT

PROSECUTOR'S OPENING STATEMENT

MR. WEISWASSER: Thank you, Your Honor.

Ladies and gentlemen, the testimony that you are going to hear for the Prosecution in this case will substantially be as follows.

On August the Thirteenth of this year, at about two o'clock in the afternoon, at an address of 7836 East Forest, at a place known as the Big D Party Store, the Defendant laid in wait with the premediated intention to kill and murder the deceased, Doyle Redding. Doyle Redding was in that store. When he walked out of that store, the Defendant stabbed him in the chest once and the knife penetrated his heart and he subsequently died shortly thereafter from the wound.

We will prove to you, beyond a reasonable doubt, that this was a First Degree Murder, premeditatedly, and as I say, laying in wait with the intention of killing the deceased.

Thank you.

MR. RUTLEDGE: Defense will reserve their opening statement, Your Honor.

THE COURT: All right. The opening statement of the Defendant is reserved.

You may call your first witness.

* * * *

[225] REDIRECT EXAMINATION

BY MR. WEISWASSER:

Q. Then, I am to understand nothing was taken from the Defendant Dennis Jenkins?

A. No.

MR. WEISWASSER: No further questions.

THE COURT: All right.

Stand down, sir.

(Whereupon the Witness was excused from the Witness Stand.)

THE COURT: Call your next Witness.

MR. WEISWASSER: People rest, Your Honor.

THE COURT: Defense.

DEFENSE COUNSEL'S OPENING STATEMENT

MR. RUTLEDGE: At this time, Your Honor, I will make my Opening Statement.

THE COURT: All right. Proceed.

MR. RUTLEDGE: Ladies and gentlemen of the Jury, now comes the time for the Defense to present their case and this is the time you recall I reserved my Opening Statement until after the Prosecution had presented their case. And at this time, I would like to make an Opening Statement so as to give you a preview of the testimony which the Defense will be presenting.

The Defense will be presenting this [226] testimony to prove that the stabbing didn't occur in the manner as described by the Prosecution's Witnesses. We will show that the stabbing was done in self-defense. That Dennis Jenkins was not the aggressor in the conflict that occurred on August Thirteenth, 1974, in front of the Big D Party Store.

That he acted in good faith, under a reasonable belief that he was—that he was in danger of his life, or serious bodily injury. And, that he had no ability to retreat.

We will present witnesses who were there at that time, whose testimony will establish that there was a struggle between the deceased and the Defendant. I will not go into the specifics of their testimony. I will allow you to determine what they say from there, the Witness Stand.

Defense will also present Witnesses whose testimony will establish that it is doubtful that the stabbing could have occurred in the manner described by the Prosecution Witnesses.

And, after all the Witnesses have testified for the Defense, and at the end of this case, I will come to you and make a Closing, and ask that you return a verdict of Not Guilty by reason of self-defense.

THE COURT: Call your Witness.
MR. RUTLEDGE: Defense would like to call * * *

* * * *

[282] DENNIS SEAY JENKINS

The Defendant herein, was thereupon called to the Witness Stand in his own behalf, and after being first duly sworn by the Court Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. RUTLEDGE:

Q. Okay. Would you state your name for the record, sir?
A. Dennis Seay Jenkins.
Q. And how old are you, Mr. Jenkins?
A. Twenty-three.
Q. Where do you live?
A. 3824 Maistique.
Q. And with whom and how long have you been living there?
A. About eighteen months.
Q. And with whom did you live with?
A. My mother and father.
Q. And where are you employed?
A. In my uncle's store.
Q. Where is that store located?
A. 7631 East Warren.
Q. Have you ever worked anywhere else?
A. Michigan Bell.
Q. Are you married or single?
A. Single.
[283] Q. Directing your attention to August Twelfth, 1974, did you have occasion to be in the area of Forest and Van Dyke?
A. Yes.
Q. And what were you doing there?
A. First—first, we was on Seyburn, over to my auntie's house. From leaving—

Q. (Interposing) Who is "we"?
A. Me, my sister, my girl friend, and her boy friend.
Q. And can you state the name of those people?
A. Willie, PeeWee, and Alberta.
Q. Can you give the first name and last name?
A. Oh. First is Cecelia Jenkins. That is my sister. Willie Brunner. That is her boy friend. And Alberta Green. That is my girl friend.
Q. All right. Okay.
Did anything occur while you were over to your aunt's house?
A. She wasn't there. So we usually go—usually go over there to play keno. And she wasn't there. So we left. And on my way back home, we was standing on the corner of Forest and Van Dyke, waiting on a cab, trying to decide whether we was going to go over to Alberta's house, or whether they were going to go home. So, we—well, really, we didn't decide. So I started walking because I said, "I am going to go over [284] to her house and I will call you when I get over there."
And they was waiting on the cab. By the time I get down to Forest and—well, it is another little short street in there, after you cross Warren—before you get to it. And I heard my sister and Willie down there hollering. And he was running down the street. And he told me, he said, "Man, the guy that I gave that match to just came up here and stuck us up."
I said, "Where did they go?"
He said, "They ran around the corner."
I said, "Let's stop—
Q. (Interposing) Go ahead.
A. I said, "Let's stop the Police."
So we goes back down to the corner and stand across the street. It is a church on the corner. And while we was standing on the corner, we could see the apartment building. And it was a light on in the kitchen. And we see the guys come in the door and cut the kitchen light off. So we stopped the Police and the Police tell us to get in the car. So we get in the car and give them our names and everything. And I showed them where the

guys had ran in the apartment building at. And I told them, I said, "Man, like they got guns, you know."

He said, "That is all right. I was a [285] Green Beret for three years."

So he told us to go ahead on, that he would contact us.

Q. All right. You mentioned something about the guy giving you a match?

A. No. He didn't give me a match, no.

Q. To whom did he give a match?

A. No. No. He got one from Billy.

Q. Were you there at that time?

A. Yes.

Q. Is that the same person who came back and robbed Billy?

A. That is one of—What Billy said, "The tall guy, the one I gave the match, came back and stuck us up." He said the little short guy had put the gun on him while PeeWee was across the street. And he said, "They took my money," you know.

Q. Directing your attention to the next day, August Thirteenth, 1974, were you in the area of Forest and Van Dyke?

A. Yes.

Q. Were you coming—Where were you coming from?

A. Coming from home.

Q. Where were you going?

A. I was going back over Miss Bea's.

Q. Mrs. Bee?

A. Mrs. Bea. I call her my auntie. She is been knowing me since [286] she was—I was—I was a baby. Her name is Miss Beatrice Bryant.

Q. Where does she live?

A. 4525 Seyburn.

Q. Were you alone or with someone?

A. By myself.

Q. Tell the Jury what happened on your way from your mother's house or to Miss Bea's house?

A. Well, I got off the bus and on my way, going over to her house, as I was coming—

Q. (Interposing) Off of what bus, sir?

A. Off the Van Dyke Bus.

As I was coming past the store, I don't know if you say I ran into him or what, but when he was coming out, and I am across, and he see's me, and he tells me, he say, "Man, what you doing following me?" I told him, "No, I am not following you."

He said, "Don't you know I will—I will fuck you up?"

I say, "Naw, man. I am not following you, man."

He say, "My man told me that you the one stopped the Police."

I said, "No, I didn't stop the Police."

[287] So I am afraid—I am trying to figure out what is he fixing to do. I am afraid to run, because I think he might shoot me in my back if I just take off running.

So—

Q. (Interposing) So, what happened after these initial words?

A. So he tells me, "What you think I am going to do, just—just let you go?"

I say, "No, man. I am not trying to do nothing to you."

He said, "You think you going to send the Police back around here, don't you?"

So I am trying to convince him that I am not going to send no Police around there to him or nothing.

Q. What happened?

A. So, he—he came at me with the knife.

Q. How did he come at you with the knife?

A. Like this (indicating).

Q. What did you do?

A. When he—when he came out at me with the knife, like I was—I was standing outside the doorway. And he was—he was in the little area or vestibule, or whatever you want to call it, and when he came at me with the knife, I caught his hand and tried to throw him through the window as hard as I could. And I pushed him up against the railing of the door. And I turned [288] around and started running.

Q. Okay.

Why did you grab his hand?

A. Because he was coming at me with a knife.

Q. Have you ever been arrested and convicted of a felony?
A. Yes.
Q. What is that, sir?
A. Attempted B and E.
Q. Anything else?
A. No.
MR. RUTLEDGE: Your Witness.
THE COURT: Cross examine.

CROSS EXAMINATION

BY MR. WEISWASSER:

Q. How about Unlawful Use of Heroin back in 1972. Were you ever arrested and convicted for that?
A. Oh. Yes.
Q. You forgot about that?
A. (No response.)
Q. Now, were you robbed in any way on that robbery that you were telling us about that occurred the night before that stabbing?
A. No.
Q. What was your relationship to Mr. Brunner?
A. (No response.)
[289] Q. What was your relationship?
A. My relationship?
Q. What was your relationship with Mr. Brunner?
A. He was my sister's boy friend.
Q. Did you work for him in any kind of a way?
A. No.
Q. Never had any kind of connections?
A. Connections?
Q. A business connection?
A. Oh, no. No.
Q. And when he was robbed, how far away were you from him?
A. I was down past Warren. It is another little street in there but I can't think of it. I can't think of the little street. But about a block, a good block.
Q. How did you know who robbed him?

A. When he came back—when we went back down there, he told me, he say, "The guy that I gave the match, man, the two guys that came up to the corner, just stuck me up."
Q. I see.
Did you see the man he gave the match to?
A. Yes.
Q. For how long?
A. Oh, we was standing there trying to catch a cab and they walked up to the corner. First it was three of them.
[290] Q. Uh-huh?
A. Uh-huh. I guess the other guy was just with them and he just kept on going. But while he was standing on the corner, they walked up there and got a match from Billy, and we trying to decide whether we all going to go together or split up, or what.
So they messing around and acting like they didn't know what they wanted to do. So we—me and Alberta start walking down the street.
Q. So the question I asked was how long did you have occasion to look at the face of the men that asked your brother for a match?
A. Oh. About a minute or so, it might have been.
Q. Just a minute or so.
What was the man's name; do you know?
A. I know now.
Q. You know now. You do.
What was his name?
A. His name is Redding.
Q. You are sure?
A. This was the man—This is the man—This is the man that this is all about.
Q. It couldn't have been a fellow by the name of Ronald Conners?
A. Ronald Conners was the little short guy.
[291] Q. You know him, too?
A. I have been in Court every day.
Q. I see. Ronald Conners was also there, wasn't he?
A. Right.

Q. He was—Wasn't he there as part of the hold up?
A. I wouldn't know nothing about the hold up.
Q. Who was the one that asked for the match, Ronald Conners or Mr. Redding?
A. The tall guy had.
Q. On the next day, on the basis—You saw him the next day, and you recognized him that day as being the man who had asked for the match the night before?
A. Billy say the two guys that asked us for the match are the ones that stuck us up.
Q. I see. And you recognized them the next day?
A. Yes.
Q. About how much later?
A. Well—
Q. (Interposing) About how much later, I am asking, from that moment that you looked at him when he asked for the match was it?
A. Well, it wasn't even—it wasn't even twelve hours had past.
Q. I see.
Did you ever see the man from before?
[292] A. No.
Q. You never saw him from before?
A. (No response.)
Q. You never knew Mr. Redding?
A. No.
Q. And as far as I understand, was it just a coincidence that you happened to be at the store when he was walking out?
A. Yeah.
Q. Now were you going in the store by buy anything?
A. No, I was going by the store.
Q. You were walking by?
A. Yes.
Q. How many times did you walk by that store?
A. Once.
Q. You didn't walk by and then walk by again and then look through the window?
A. No.
Q. You didn't walk back and forth?
A. No.

Q. Did you look into the windows of the store at all?
A. Not really.
Q. There are windows on the store, plate glass windows, aren't they?
A. Really, I wasn't paying any attention to looking in the [293] windows.
Q. Uh-huh.
A. I was more so concerned about what he was doing. And I know I had just got stuck up around there, or they just had got stuck up around there.
Q. How long—
A. (Interposing) And, we had sent the Police around.
Q. How long—
A. (Interposing) How many?
Q. How long before?
A. Like I say, it was less than twelve, sixteen hours before then.
Q. You were still afraid after twelve or sixteen hours later and you walked around in broad open daylight there?
A. I didn't think I would ever see them again.
Q. See who again?
A. I didn't think about seeing him again.
Q. Were you afraid when you saw him?
A. Wouldn't you be?
Q. Were you afraid?
A. Yes, I was.
Q. Why didn't you run; why did you just stand there?
A. I was afraid that he would shoot me in my back.
Q. Were you afraid because he had a gun in his hand?
A. Well, the night before—
[294] Q. (Interposing) Just answer my question.
Did he have a gun in his hand?
A. I didn't get a chance to see.
Q. Why were you afraid of what he didn't have in his hand?
MR. RUTLEDGE: I will object. He is arguing with the Witness.

THE COURT: No, that is proper Cross Examination. Overruled.

Q. (By Mr. Weiswasser) Did he have anything in his hands?

A. I can't remember. I was too afraid.

Q. Do you remember if he had a package that he was carrying?

A. I was too afraid of what he might do to me.

Q. I show you People's Exhibit Number Two, which is a photograph of that store.

(Indicating)

Where were you when you first saw this man?

A. I was coming this way (indicating).

Q. You were coming this way (indicating).

A. Right.

Q. And where was he when you first saw him?

A. When I first saw him, he was coming out the door.

Q. He was stepping out the door and you were over here (indicating)?

[295] A. I was about right up against this, like our eyes met.

Q. And you never looked in there first?

A. No.

Q. You didn't look inside the window and kind of smile and walk away?

A. Uh-huh.

Q. Uh-huh.

Did you ever see him with a knife in his hand?

A. Yes. When he came at me.

Q. I see.

Isn't it true that the only time you saw a knife in his hand is when he pulled it out of his chest out in the street?

A. No, it is not.

Q. And you never saw that knife before, did you?

A. No, I haven't.

Q. The one that was introduced in evidence?

A. No.

Q. Never had?

A. No.

Q. All you were doing was defending yourself, in other words?

A. That is right.

Q. Is that right?

[296] A. Yes, sir.

Q. Against a man that came out of door with a knife in his hand?

A. Right.

Q. And I suppose you waited for the Police to tell them what happened?

A. No, I didn't.

Q. You didn't?

A. No.

Q. I see.

And how long was it after this day that you were arrested, or that you were taken into custody?

MR. RUTLEDGE: I object, Your Honor.

I would like to know the relevancy. I don't think that that question is really relevant.

THE COURT: It could be.

Overrule the objection.

We will take the answer.

Q. (By Mr. Weiswasser) How long after August the Thirteenth, was it that you were taken into custody?

A. I guess it was a little over a week. Me and my mother and my uncle—

Q. (Interposing) You are sure it was a little over a week?

A. Yes, or ten days, twelve days.

[297] Q. Could it have been over two weeks?

A. I am not real sure.

Q. Could it have been August Twenty-Ninth, two weeks and a day later?

A. No. I remember exactly what day it was that I came down.

Q. Well you have been here throughout the course of this trial, have you not?

A. Right.

Q. Did you hear the Detective testify yesterday that you were taken into custody on August the Twenty-Ninth?
A. I don't think it was August the Twenty-Ninth.
Q. You don't.
A. No, because I wasn't taken into custody, like, that—
Q. (Interposing) When was the first time that you reported the things that you have told us in Court today to anybody?
A. Two days after it happened.
Q. And who did you report it to?
A. To my probation officer.
Q. Well, apart from him?
A. No one.
Q. Who?
A. No one but my—
Q. (Interposing) Did you ever go to a Police Officer or to anyone else?
[298] A. No, I didn't.
Q. As a matter of fact, it was two weeks later, wasn't it?
A. Yes.
Q. And now, do you remember Mr. Redding throwing a bottle at you?
A. Not really.
Q. Not really.
He never did, after you stabbed him?
A. Listen. You want to know the truth? I was so afraid, I didn't think about turning around to look to see what was happening.
Q. As a matter of fact, you were so afraid when you first saw him that you stabbed him, isn't that right?
A. No, that is not right.
Q. That is not right.
As a matter of fact, isn't it true that you were in front of that store because you were looking for him and to get even with him for what he had done to Mr. Brunner the night before, at least, according to your idea?
A. No.

Q. Isn't that true?
A. No, it is not.
Q. Weren't you walking up and down looking for him?
A. No, I wasn't.
[299] Q. And waiting for him to come out the store to stab him?
A. No, I wasn't.
Q. Now, in what hand did the deceased have the package he was carrying?
A. I—I was—I don't remember no package. I was—
Q. (Interposing) Where did—What hand did—Where did he take the knife from?
A. I caught his right hand.
Q. Uh-huh.
And did he drop anything he was holding in his hands at the time?
A. I don't remember.
Q. Did he walk out of the store with a knife in his hand, or did he take it out of a pocket?
A. When I tried to push him as hard as I could—
Q. (Interposing) I asked—
Just answer the question that I asked you.
Did he take the knife out of his pocket?
A. I do not remember.
Q. (Interposing) I asked—
Q. Or, did he have it in his hand when he came out the store?
A. I do not remember that. I am trying to figure out what did this.
Q. Show us how he held that knife.
Q. I don't know—
[300] Q. (Interposing) Did he stop and go like this (indicating); and open it up and then stab you, and you were standing there waiting to be stabbed; is that what you are telling us?
A. When we were standing there—
Q. (Interposing) Just answer my question.
Is that what you are telling us?
A. Telling—Repeat the question.

Q. You waited to see him pull it open and open it up and make a dagger out of it, and waited for him to stab you; is that what you are telling us?

A. When he came out—

MR. RUTLEDGE: (Interposing) That question is so long, how can it be answered?

THE COURT: Just a minute, sir.

MR. RUTLEDGE: How could he answer a question when he has compounded the question three or four times?

THE COURT: No, I don't think that question is so complicated.

I will take the answer.

Q. (By Mr. Weiswasser) You were waiting there for him to open up the knife, pull it out, and make a dagger out of it, and you were standing there for him to stab you; is that what you are telling us?

[301] A. No. I am telling you that when he came at me with that knife, I tried as hard as I could, to—

Q. (Interposing) "to", what?

A. To push that knife in him as far as I could.

Q. I agree with you, sir.

But, at the time you were trying to push that knife in him as far as you could, that knife happened to be in your hand, wasn't it?

A. No, it wasn't.

Q. He just came out of the store carrying a package that you don't remember—

A. (Interposing) No, he came—

Q. (Continuing)—and then he opened the knife and he had to take it out and open it up and make a knife with it, he did all this and you stayed there because you were—

MR. RUTLEDGE: (Interposing) Objection, Your Honor.

Q. (By Mr. Weiswasser) (Continuing)—afraid of him?

MR. RUTLEDGE: The Prosecutor hasn't asked a question. He is arguing to the Jury.

THE COURT: I sustain that objection.

MR. WEISWASSER: I have no further questions of the Witness.

THE COURT: Redirect?

[302] REDIRECT EXAMINATION

BY MR. RUTLEDGE:

Q. How did you arrest come about, Dennis?

A. Me and my mother and my uncle, we talked to Coleman Young the night before the twenty-seventh, and I went down and turned myself in. Me and him and his bodyguard came over to Recorder's Court and went in front of Judge Crockett.

Q. Okay.

Did you stab Redding—Once again, what is the reason that you stabbed Redding?

THE COURT: Counsel, is it necessary for you to repeat that?

A. I was afraid.

THE COURT: Just a minute.

It is on the record several times. Do you want to keep going over it?

MR. RUTLEDGE: Well, I believe the Prosecutor has made—

THE COURT: (Interposing) I think there is no need to cover it again. You have covered it on your Direct.

MR. RUTLEDGE: No other questions.

THE COURT: Anything else of this Witness?

[303] MR. WEISWASSER: Just one question.

RECROSS EXAMINATION

BY MR. WEISWASSER:

Q. Was there any special reason why you went over to the Mayor's Bodyguard and to the Mayor and everything else to surrender yourself instead of going to the Police the same day when this happened, instead of waiting two weeks to go to the Mayor?

A. Yes, it is.

Q. What is the reason?
A. Because I was afraid. Judge Gardner just had gave me probation.
Q. You were afraid of whom?
A. I was afraid what I had happened.
Q. But you hadn't done anything. You were just defending yourself.
A. But, I don't know anything about the law.
MR. RUTLEDGE: Your Honor, I object. He is arguing with the Witness.
THE COURT: Sustain that objection.
MR. WEISWASSER: I have no further questions.
THE COURT: Anything else?
MR. RUTLEDGE: Defense rests.
[304] THE COURT: Thank you, sir. You may stand down.

(Whereupon the Witness was excused from the Witness Stand.)

THE COURT: Any rebuttal?
MR. WEISWASSER: People have no rebuttal.
THE COURT: All right.
The next step in these proceedings, ladies and gentlemen, will be closing arguments. And then, we will have the instructions to the Jury.
We will take the closing arguments after a short recess, and then I will instruct you on the law.
We are making plans for your dinner if we find it is necessary.
Step into the Jury Room.

(Whereupon the Jury was excused from the Courtroom.)

THE COURT: Counsel, let me see you back in chambers.

(Whereupon a recess was taken; pursuant thereto, the matter was resumed.)

THE COURT: Mr. Weiswasser, are you ready?
MR. WEISWASSER: Yes, Your Honor.
[305] THE COURT: Defense Counsel?
MR. RUTLEDGE: Yes, Your Honor.

THE COURT: All right.
Bring the Jury out.

(Whereupon the Jury was summoned to the Courtroom and seated.)

THE COURT: Will the parties stipulate that the Jury is present and properly seated?
MR. WEISWASSER: People so stipulate.
MR. RUTLEDGE: Defense so stipulates.
THE COURT: All right.
You may proceed with your closing arguments.

PROSECUTOR'S SUMMATION

MR. WEISWASSER: Thank you, Your Honor.
Ladies and Gentlemen, the testimony in this case didn't take too long. I don't see much sense in going over it bit by bit, detail by detail. You heard it. You saw the Witnesses. You had a full opportunity to observe them and listen to them. So, I am not going to extend a lot of time going over it bit by bit, all of the morbid details. I am simply going to touch on what I consider to be some of the highlights. And, I am going to mention a Witness that you saw but did not hear.
It is the theory of the Prosecution in [306] this case that the Defendant went out looking for the deceased, and when he found him, he laid in wait for him to come out so that he could kill him. And I think that the reason—the motivation is something which you heard of in the testimony. You heard the testimony of the Witness Ronald Conner, who admitted that he had committed a Robbery Armed on the—some man, with the Defendant about a half a block away, he says, and somebody else says he was a block and a half away. I think Mister—the man who was robbed himself, Willie Brunner said he was a block and a half away at the time that Willie Brunner was robbed.
Now he admitted all this. He told you that he robbed Willie Brunner and took not only money, but some narcotics from him. Now I suggest that the testimony indicates that there was some kind of connection between

Mr. Brunner and the Defendant which resulted in the Defendant going out looking later on that day for the deceased, with the intention that he had formulated in his mind that when he found him, he was going to do something about it, and to put it very bluntly, flat out, I think this was a part and parcel of a narcotics trafficking, and it grew out of it, and was part of the circumstances that are involved in this type of traffic.

You know, the Witnesses in this case that [307] you heard, Ronald Conners, first, and I told you, he is admittedly a friend of the deceased, of Doyle Redding, admittedly, he committed a Robbery Armed—stole some narcotics and some money from Mr. Brunner. And you might thing that his testimony—there is a question as to how much credit you can give to it, and how much you can believe from everything that he said, from what he saw from the upstairs window. But, every single thing that he told you that he saw was corroborated by Mr. Gaines, the clerk in the party store.

MR. RUTLEDGE: I would object to that, Your Honor.

I hate to interrupt the Prosecutor in his closing. But I think he is misquoting the testimony.

THE COURT: The Prosecutor, along with yourself, counsel, can make comments about the testimony. If they are incorrect in their comments about the testimony, that is for the Jury's determination.

You may proceed.

MR. WEISWASSER: All right.

You heard the testimony of both Ronald Conners and Robert Gaines. And I state to you that what you heard was Mr. Gaines in every significant detail corroborated what Ronald Conners told you that he saw from [308] the upstairs window, and that he made a statement of to the Police, if you will remember, fifteen, twenty minutes after the crime had occurred. And the Police Officer came and he told him what he had saw—what he had seen. And the Police Officer wrote it down. And everything that Mr. Conners stated on the Witness Stand was corroborated by Mr. Gaines in every significant detail.

Mr. Gaines was a distinterested Witness. He didn't know either party. His only connection—his connection with them was he knew Doyle Redding, the deceased, as a customer who came in there and bought things. He knew the Defendant as a person he had seen on the street. There is no reason for him to lie. There was no reason for him to do anything but simply tell you what he saw. He told you. And his testimony is, at least, partially corroborated by his aunt that didn't see the face of the individual, because the deceased's body blocked her view. But she did see a fragmentary smile on the face of the person that assaulted the deceased. And she what happened. And you heard what she testified to. There was an action at the door and the man staggered back and it all happened in just a moment. No struggle. No five, ten minutes out in front. No lengthy struggle. The whole thing just took—(indicating)—less than a minute. There was an immediate action. There were no [309] words spoken.

The testimony of Mr. Gaines was that he saw the Defendant walk by the store twice. He saw him looking in the window. He saw him waiting in front of the store. He saw him with his hands behind his back. To me, that means he was holding that knife with the blade open behind his back after he spotted the deceased inside the store through the windows of that store. He testified that the deceased, Redding, exited with a package in his hand. He testified that he saw the deceased pull the knife out of his chest and run after the Defendant.

Now if anyone did see the deceased out on the street with a knife in his hand, it was after he had pulled the knife out of his chest that the Defendant had put there. But, in questioning the Witnesses—and, I know you heard some Witnesses here that I would submit their credibility is for you to consider—and they don't even remember whether it happened around noon or two o'clock, or—and the discrepancy between a time of two hours, and the things that they saw, the record indicates how reliable they are, and much credit you can attach to the things that they said. But we will talk about that later.

But, you see, there is a silent Witness in this case. Like I told you, a Witness that you saw, and as [310] you can see, again, a Witness who cannot lie. A Witness who speaks—that speaks with a mute tongue, only because of what it is, and how it operates. Remember that Mr. Gaines said that the deceased exited the store with a package in his hand, that there is testimony that it was thrown at the Defendant. After the deceased was stabbed with a knife, he chased the Defendant and threw the package at him. This is the silent Witness (indicating). With a package in his hand, how could Doyle Redding have taken this knife and opened it?

(Indicating) To get this guard that is used to cover it into a dagger with a package in his hand? This is not a switch blade. It takes two hands to open it. How could he have done it with a package in his hand the way the Defendant tells you that it happened? How could he possibly have done it?

You know, you can take that knife in that Jury Room when you go in there to deliberate. You can test it. You can try to open it. See how easily it opens. Just try to open it yourself. You can even try to open it with something else in your hand and see if you can open it when you are in that Jury Room considering the testimony in this case and the decision that you have to reach.

And, if you have any doubts, reasonable doubts, that are so much hounded at you by Defense Counsel, [311] just remember that silent Witness who cannot lie.

There is another few points I think I'll touch upon. Remember this, too. The testimony of the Defendant when he was on the Witness Stand, when he said—and I wrote down the words that he said—"I tried to stab him as hard as I could." Of course, he presented it to you on the basis of pushing it and somehow or another the knife got into his chest. And he was defending himself. There was kind of an idea that it was an accident, or in defense of himself. But he pushed it as hard as he could into the man's chest. That is the Defendant's own testimony when he was on the Witness Stand.

Somehow or another, I do not see an accident there, or I do not see self-defense. Not when you consider how

that knife got into the Defendant's hand, and what must have been done to make it work so that you can stab and kill somebody.

Now he waited two weeks, according to the testimony —at least two weeks before he did anything about surrendering himself or reporting it to anybody. And then, after two weeks, he pulled the grand stand stunt of surrendering himself to the Mayor, because he claimed he was afraid. Of course he wasn't afraid during the two weeks, but after two weeks, he decided he was going to be afraid and he [312] was going to surrender himself to the Mayor. I don't know what he really was afraid about. But he didn't make that very clear. He was afraid because of something that he had done. And, it might be something that might militate against his own interest. I would suggest to you that he waited two weeks before he surrendered himself because he did it after he had lined up all those witnesses.

MR. RUTLEDGE: I would object to that, Your Honor. I think that is an improper inference from the testimony that has been adduced from this trial.

THE COURT: This is closing arguments. We will allow that.

MR. WEISWASSER: I suggest that he surrendered himself after he had those two Witnesses to line up all of those Witnesses that you heard testify. And the most that anyone of them really said that really amounted to anything that you can believe is that they did see Doyle Redding, the deceased, with a knife in his hand. Which they probably did. Sure they did see it. No question about it. After he pulled it out of his own chest, after the Defendant had put it there. And he pulled it out of his chest and he went after the man that stabbed him.

It hasn't been a long trial. You have paid close attention. I have observed that. And I notice [313] that you have observed the Witnesses. I don't think there is too much commentary that has to be made. The facts speak more eloquently than I can, and I rely a lot on my silent Witness. I would like to have any kind of an explanation that can vouchsafed by anybody when you go into that Jury Room and test this knife to account

for the story—the Defendant's story as to the way it happened, against what you yourself can learn from this silent Witness.

MR. WEISWASSER: (Indicating)

THE COURT: All right?

MR. WEISWASSER: All right.

THE COURT: Defense.

DEFENSE COUNSEL'S SUMMATION

MR. RUTLEDGE: Good evening, Ladies and Gentlemen of the Jury. It has been a long day.

Before making comments to you about the facts of this case, I would like to take this opportunity to thank you for participating as Jurors in this case. This is an important and difficult case. I realize that many of you made sacrifices. However, I am certain that you have done this not only to fullfill your civic duty, but to see that truth and justice are properly administered in our Courtroom. And, for this, Ladies and Gentlemen, I wish to express my sincere appreciation.

During my—the course of my discussion [314] with you, I will be analyzing and going over some of the testimony that I heard from the Witness Stand. If I make references to evidence which is in conflict with your own recollection of that evidence, I ask you to refer to your recollection rather than mine. And, I ask you not to feel that I have intentionally misquoted the testimony.

Dennis Jenkins has been charged with, on August Thirteenth, 1974, in front of the Big D Party Store, with having feloniously, deliberated, willfully, with malice aforethought, and with premeditation, kill and murder one Doyle Redding. The Defense contends that after looking at all of the evidence, that there several areas of reasonable doubt as to whether or not there has been a premeditated, deliberate, willful, malice killing.

Now we have the testimony of several Witnesses which I would like to go into. There was the testimony of Ronald Conners, and I think it is interesting that the Prosecutor brings up the record of Mr. Conners, and seems to summarily dismiss it. And then he seeks to

impugn some less credibility to the other Witnesses who had records, in this case. But in light of that, Mr. Conners testified that he was looking out the window and he saw Doyle Redding enter the store with Dennis Jenkins passing by the store, right behind Doyle Redding's entrance into the [315] store. He saw Dennis continue going east, past Van Dyke. He lost him when he past Van Dyke. Then he stated he saw him return to the area, walking west on Forest, and reach the store at about the same time Doyle Redding exited the store. And he next observed Dennis Jenkins without stopping—I think that was his words—grabbed at Doyle Redding, the deceased, and with a over the shoulder motion—if you recall, I asked him several times the type of motion which he observed the Defendant making in regards to the inflict—the infliction of the wound, and the Judge even at one time told me "That is enough"—but I kept asking him, and it was a over the shoulder—over the shoulder, came at him over the shoulder and stabbed Doyle Redding.

I submit this testimony is in direct contradiction with the testimony of the other Prosecution's Witness, Robert Gaines. Robert Gaines testified that he observed Dennis Jenkins only once, and that was when Doyle Redding was leaving the store. And he observed Dennis pass the store, and the—the store door, and he stated that he got right to the—to the west—westerly edge of the store door, stopped, and then backed up and then waited for a few seconds. And then he observed Dennis Jenkins with—and that was his testimony—with a straight forward thrust, stabbed Doyle Redding. And that was his testimony in direct [316] contradiction between the testimony of the Prosecutor's main Witness to the stabbing of this case.

And, Ladies and Gentlemen of the Jury, they have contradicted one another, and the Judge will instruct you if you believe that a Witness has been contradicted in their testimony, it is within your exclusive province to give the testimony of that Witness such credibility, if any, as you may think it deserves.

Now all I can say is I think it is rather clear—and I am not misstating the testimony—one man said it was over the shoulder motion and over the shoulder (indicating), and Mr. Gaines stated it was a straight forward thrust. And that is in direct contradiction.

Also, what is in direct contradiction is Mr. Conner saying that he didn't see him pass the door upon returning. His testimony, and I tried to be very explicit in getting the answer from him—"Did he stop along the way?"

"No, sir. I did not see him stop at the barber shop, nor at the other store."

He seemed to confront him right in front of the store with an over—over the shoulder motion, and stabbed him. And yet the Prosecutor's other Witness, Robert Gaines, states that Mr. Jenkins walked past the store, to the left, and there is a picture here (indicating) there is a [317] picture here which I want you to take to the Jury Room. And, he states that he saw him walk—and I am referring to this end (indicating)—and then walk back and wait.

Ronald Conners testimony, I submit is somewhat improbable. He states that he recognizes Dennis Jenkins when he passed by the store the first time. He said—how did he recognize him? He recognized him as one of the persons in the group that he had the night before robbed. And yet he expects you to believe that—the Prosecution expects you to believe that he said nothing or did nothing to bring anything to the attention of Doyle Redding who was in the store. And his position is such that one can almost infer that he was a lookout in the window, with his knees on the sofa looking out of the window, with the window up. And the testimony has come out that the distance between the apartment building and the store was such that it wouldn't take much of a shout—it wouldn't take much of a statement to say "Hey, he is coming."

Now the next Witness who testified, the next Witness was the doctor. He indicated there was a—one stab wound to the chest, in a slightly downward fashion. He also stated that he couldn't determine what force or what

manner the wound was inflicted. In that testimony in and if itself, though, means that the wound, which was inflicted, is [318] consistent with the Defendant's theory of the case—that the act was done in self-defense, or by accident. And I will get to that.

Let me state at this point—I should have brought it up earlier—the Prosecutor has two opportunities to talk to you. I only have one. So I may be a little bit longer. But I have to get everything out that I can, see? If there are any questions that I should have asked Witnesses on that stand, or things I should have done differently, I ask that you blame me and not my client, and not make him attributable for my mistakes I may have made in this trial.

That is the doctor's testimony. The wound that was inflicted, it can be consistent with the Defendant's theory of the case. The stabbing was done by self-defense, or by accident.

I won't go through the testimony of the Police Officers. It really doesn't add or subtract from the issue. He didn't see anything. He came afterwards and sought to preserve the knife for prints, but it was too late, as the evidence technician testified and stated too many people's hands had been on it. That is unfortunate. But that is how it came out.

I have already discussed some of the [319] testimony of Mr. Gaines. But I ask you to consider that he stated that he had been working at that store, I think, for four years. Use your own recollection. I think it was four. But, he did state he had known Mr. Redding, the deceased, for two or three years he had been coming in the store. He regarded him as a regular customer. He regarded him as a friend. He even—I am not going to make more out of it than that, but Mr. Redding had been coming into that store for two or three years. And the Judge will instruct you that you may in considering the weight to be given for testimony from any of the Witnesses, consider their relationship to any of the parties in the case.

Also, I ask you to take a look at this picture and ask yourself whether or not Mr. Gaines could really

have seen a knife in the hand of the deceased. He testified that he was on this side of the store (indicating). And I was very specific in finding out that he never left behind the counter until the stabbing had occurred and the parties ran out of the store. Did he come out of from around the counter and some outside that store? You will see a lot of obstructions in the window. I submit—I submit that it makes it somewhat possible that he couldn't have seen, because of the view that he had in the store.

Defense contends that there are several [320] areas in which there is a reasonable doubt as to whether Dennis Jenkins committed the stabbing in self-defense or by accident. I have raised a couple with you—the testimony of Mr. Conners and the testimony of Mr. Gaines, where there is direct contradiction at certain points, material points, material points because it points out did they really see what happened. Both did state there was no struggle. But on considering their statements, take in the fact that they really didn't testify as to the same facts as to what happened—as to how the stabbing, as they allegedly—allegedly say it occurred; one with an over arm motion, and the other, straight forward.

Now the Defense presented some Witnesses in this case whom, by investigation, we came up with. Now I don't want to fault the Police Officers. We had the Police Officers on the stand. He stated, yes, he went out in the area and sought to get statements. But he was unable to do so because the people were uncooperative. I think it is unfortunate that this type of uncooperation is given to the Police Department. But it is a fact, and in our office, we have an investigative staff which are very able to relate to the people of the community. Maybe, a little bit better. And they seek to bring in—Now, we sought to bring in other people besides the people that the [321] Prosecution brought in. And that was to get all of the facts about this case. Mr. Weiswasser is correct. We didn't try to hide anything. They got on the stand and said, "We did not see a knife during this." They stated, first, there was a struggle. There was a struggle in front of the store which drew some attention in from

the local residents who were there, and they came around to look.

Now I am going to refer to my notes, because I don't want to misquote any of the Witnesses.

(Indicating)

There was first the testimony of Omar Wright. Yes, he has a long record. And you can take that—the Judge will instruct you you can take into consideration in the weight you give to his testimony. Is his record any worse than Mr. Conners? And, you can't contradict what he states that he was with—living in that area. He didn't see a knife until the deceased chased Mr. Jenkins down the street. What is it? He saw a struggle. He saw a struggle which in and of itself almost precludes the Prosecution's theory, that this case—that this act was done with premeditation and deliberation and malice aforethought.

Defense contends there is no First Degree charge here. The evidence has not been supportive of such a verdict.

[322] The next two Witnesses testified to about the same—Mr. Berrien, and Mr. Cunningham—they saw a struggle and they didn't see a knife until Mr. Redding came out of the store. They did see a struggle.

And we also put on a neurologist. The importance of his testimony was to establish the fact the Defendant is left handed. Beyond a reasonable doubt, he is left handed. Both of the Prosecution's Witnesses, Mr. Gaines and Mr. Conners, stated that when he stabbed him—although they had different motions, they—but they agreed that it was with the right hand. Yet, is it plausible if they are laying in wait, and going to commit an act of revenge or whatever, to stab someone with their less weak—with their weak hand, with their less dominant hand, or would they use their strong hand?

Mr. Jenkins is left handed. Mrs. Stanton testified to that. She says she played—well, she observed him playing baseball. She didn't know too much about the ball game, but she recalled him being left handed. And the doctor's testimony was the same. I put the hypothetical to

him, the same thing that was suggested by the Prosecutor, and asked what hand would he have used. They stated it was likely and a reasonable inference could be drawn that it was done with his dominant hand. That raises another area of reasonable doubt that—a reasonable doubt that Dennis Jenkins—that this is a First Degree charge which the Prosecution would ask you to find.

Now we put Mr. Jenkins on the stand. He has no duty to testify. He could have remained right there in his chair and said, "Prove me Guilty beyond a reasonable doubt." He has no burden. We have no burden to sustain. You must—before you reach a verdict, be sure, beyond a reasonable doubt, as to each and every element of the offense as the Jury will charge—as the Judge will charge, excuse me. But Mr. Jenkins did get on the stand and he did testify. He was a little open, but he was a little nervous. But he stated what happened and what he did. And I think that the testimony of Mr. Jenkins establishes that the act was done—either in self-defense, or by accident. The accident is an excusable homicide. And the Judge will instruct you as such. It is an act done which is excused because of the situation.

Self-defense is a principle of law. It has been around as long as all of the other principles of law has been around, which establishes that a person can commit a homicide, but it can be justifiable. And the Judge will instruct you that a person can be acquitted by reason of self-defense, if, one, they were not the aggressor—and there is [324] certainly an inference that can be drawn from the testimony that Mr. Redding was the aggressor. The night before he had robbed a person who was in the company of Mr. Jenkins, and he knew that—and they had met each other that night. And maybe—maybe not for long, but long enough to establish a reasonable fear of Mr. Jenkins—in Mr. Jenkins if he ran into him. And enough to make Mr. Redding the aggressor if he ran into Mr. Jenkins. We maintain that Mr. Jenkins was not the aggressor, that he acted in good faith, under reasonable belief that his life was in danger, or that he was in risk of serious bodily injury. And third, he had no way to retreat. How could he? The man is coming at

him with a knife. You can't turn around—away from a man that has a knife. He could have had a gun. Mr. Brunner testified that on the night before one person had a knife and one had a gun. So, that in and of itself raises in Mr. Jenkins' mind when he saw him the next day, he could have had a knife, he could have had a gun. He couldn't run. It was not—it was not possible for him to retreat. He had to defend himself. Although his first action was just spontaneous—to push him away, which is the accident. And then the testimony can be characterized, "I went—oh, hey—and pushed as far—as hard as I could." That is self-defense. Knowing if he didn't, his own life was in jeopardy.

[325] I think there can be no question about that. Mr. Jenkins pulls out that knife—excuse me. The deceased pulled out that knife from his chest and chased him down the street with it. And he caught him—

There was the testimony—the testimony does establish—and we don't have to prove self-defense, or accident beyond a reasonable doubt. If in your mind, when you go into deliberate there is a reasonable doubt as to whether the act was done in self-defense, or by accident, you must acquit. You must acquit.

To make a few responses to the Prosecutor's case, he is going to speak again. But he stated that the Defendant went back for the deceased. It is probable if you are going to go looking for a person, are you going to go looking for him with a knife when there is access to guns in this city, which is unfortunate, but it is here. You are going to try. You are going to be laying in wait to kill a person with a knife? Mr. Redding owned one. Mr. Jenkins worked at a store, and with—where there probably would have been access to guns if he were so inclined.

I don't think that Mr. Gaines can really be characterized as a distinterested Witness. He lived in that neighborhood and he admitted, "Yes, there were dope [326] houses," and he knew of them. And probably felt certain compunctions in here to testify with regards to that.

And the silent Witness which Mr. Weiswasser makes so much of—

May I see the knife, please?

MR. WEISWASSER: (Indicating)

MR. RUTLEDGE: He asked, "How can one with a package in his hand open up a knife with one hand?" I think that there are a lot of ways. I know in the neigborhood I grew up in you could put a match between the blade and the handle of the knife and just enough to give it a little action on it (indicating). And, who is to say that knife wasn't already open when Mr. Redding came out of that store, that Mr. Conners was not acting as the lookout? He certainly saw—he did state through the testimony of Bonita Hicks, she said Mr. Conners told her to "Shut up. Be quiet. Something was up."

And the Prosecutor also tries to make something of the fact that Mr. Jenkins waited two weeks. He wasn't arrested. He turned himself in. He turned himself in and he came into Court. And he places his life in your hands.

I state that—that the testimony—I contend that the testimony that has been established should [327] vindicate Mr. Jenkins coming in. It establishes that there is a reasonable doubt as to whether or not the act was done by accident or in self-defense.

Thank you, very much.

THE COURT: Rebuttal.

PROSECUTOR'S REBUTTAL

MR. WEISWASSER: Ladies and Gentlemen, you have just heard The Court say "rebuttal", which means that I have the right to give what is known as a "rebuttal argument". And in all fairness, I can't bring up anything new where the Defense doesn't have a chance to answer it. And all I can just do is to answer some of the things that counsel said in his final argument. And, that is all. I can't bring out anything new.

But while counsel did have an opportunity to talk about my silent Witness, because of the very nature of the unanswerable facts, he could not really explain it to you. All he could do was to say to you when he was a little boy he remembers some knives that they used to use with a match, and so forth. Well, when you go into that Jury Room, you can test this knife anyway you want—with a match, or anything else—and see if it can be opened with one hand. Test it for yourselves. Test the Defendant's testimony. Test what he told you on the Witness Stand. Test if it is possible for it to be the way he told it to you. And, if he [328] lied, why did he lie? Why would he lie in his testimony about what the deceased did and what he did to counter. If it was not from a strong sense of guilt, the feeling that he himself knows what he did, and the reason that this is not explained to you is because it cannot be explained in the light of the testimony of the Defense. It simply cannot be explained. So all you can do is say it could be, or it may be. But when you go into that Jury Room, you check it out yourself.

When counsel tells you to look at this picture and see how it is impossible for Mr. Gaines to see what went on because of the stuff piled in the windows, and so forth, as I remember Mr. Gaines' testimony, he saw what happened at a door, not through the window. He saw the Defendant looking through the window. He saw him going by several times—several times. But the confrontation between the deceased and the Defendant occurred at the door. And it is clearly visible. It is even visible to Mr. Gaines' aunt in the back part of the store eating, where she couldn't even see it all because the deceased's body blocked it. But she was able to see at the back part of the store and Mr. Gaines was right at the front counter.

I am very interested in counsel's reference to Mr. Conners being up there in the apartment [329] across the hall—across the street looking out the window as a lookout. A lookout for what? As I understand the testimony, Doyle Redding went to the store to buy some pop and some other things there. And he carried it out in

a package. How did he and Ronald Conners know or have any way of knowing that the Defendant was going to come to that store? How did they have any idea that he would be there looking for either one of them, or even coming to that store? And, if he was a lookout in the apartment outside across the street, outside of using a rifle with a scope on it, what was he going to do as a lookout? He was going to warn the Defendant—the deceased inside the store that if he saw Redding—how was he going to communicate with him? Holler? Yell at him? Tell him that he saw him with a knife?

Yes, I agree with counsel that it is bad that people are uncooperative with the Police, that they don't tell the Police things that they saw. And, if there were Witnesses there, why did they not give the Police their names and tell what they saw?

Well, you will note that every Witness that the Defense did present allegedly as a person who saw what happened, neither waited for the Police to come, or went to the Police. They never came out of the woodwork until the trial today, as far as we knew. Why? Why, if they were [330] simply people disinterestingly telling what they saw? Why did they not go to the Police or wait for the Police to come and tell them what they saw the way Mr. Gaines did? The way his aunt did?

MR. RUTLEDGE: I would object, Your Honor, because that is incorrect. There is nothing in the testimony that—which states that Mr. Gaines and Mrs.—or the other Witness, went to the Police. That is improper.

THE COURT: That is an interpretation of the facts from which the Jury will make their determination.

MR. WEISWASSER: I think you know of your own knowledge that evidently the Police talked to Mr. Gaines and did talk to the aunt, and did talk to other people. And they did take the names that they could get, and they did get statements and they didn't get all of this information.

But, as far as these Witnesses that were presented to you, how did the Defense know who they were? They never gave their names to anybody. You remember what

I told you in my opening argument? Because I suggested to you that the Defendant had been in contact with them for two weeks before he surrendered, and discussing with them the possibility that they had seen things a certain way. And then he surrendered. And these Witnesses are presented to you as [331] being people who are testifying to you as to what they really saw.

Counsel also argues, "Is it plausible to believe that a left handed man would be lying in wait with a knife to kill somebody and hold the knife in his right hand instead of his left hand, which is the stronger hand?"

Yes, it would be plausible, if he had both hands behind his back the way Mr. Gaines said he had them. And it would depend upon in which hand he had the knife. And if you will remember the Defendant's own testimony, he said, "I pushed as hard as I could at the—Mr. Redding."

And, sure, he pushed with that strong hand on the left, but he had that knife in the right hand.

He had no way to retreat, after all, he was in a position of extreme danger and he had no way to retreat.

He could have retreated if he was afraid of this man when he first saw him in the window—through the window of the store inside the store. All he would have to do was keep going. Run. Leave. And what did he do? He waited for him to come out—this man that he was afraid of. He waited for him to come out with that knife behind his [332] back in his hand—right, left—whatever it is. It wound up in the chest of the deceased.

You know, in every criminal case, in every murder case, the Prosecutor is at a disadvantage. You see, the Defendant in every criminal case is present through every moment of the trial. He is presented to the Jury in the best possible light that can be presented of his appearance. If he does take the Witness Stand to testify, he is presented in the best possible light that he can be shown. But we cannot show you the deceased. We cannot show you Doyle Redding. We cannot let you see what kind of a person he is. Likeable, lovable, es-

sentially a decent person. We can't do that. We can't present him to let you know his version of what happened. We have to rely upon the Witnesses who can testify to what did happen.

You know, in this State, the State—the law says you cannot take the life of even a convicted murderer. We do not have capitol punishment in this State. I want to know why this man had the right to do that which the law cannot do, which the State cannot do, and which only God has a right to do.

Thank you.

THE COURT: All right.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 78-6809

DENNIS SEAY JENKINS, PETITIONER,

v.

CHARLES ANDERSON, WARDEN

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 1, 1979

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-6809

DENNIS SEAY JENKINS,

Petitioner,

v

CHARLES ANDERSON, Warden,

Respondent.

_____/

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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SUPREME COURT OF THE UNITED STATES

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DENNIS SEAY JENKINS,

Petitioner,

v

CHARLES ANDERSON, Warden,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Petition contains adequate reference to the order of the United States Court of Appeals for the Sixth Circuit, a copy of which is attached to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Were Petitioner's constitutional rights violated at his state court trial by the prosecutor's questions and comments concerning Petitioner's failure to report a stabbing incident for over two weeks?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition adequately sets forth relevant provisions.

STATEMENT OF THE CASE

Originally charged with first degree murder in connection with a stabbing death, Petitioner was convicted by a state court jury of manslaughter and received a sentence of 10 to 15 years imprisonment. There were several eye-witnesses to the stabbing and the prosecutor adduced evidence indicating that Petitioner Jenkins had been observed lurking outside a party store and that when the intended victim left the store Jenkins, without provocation, attacked him with a knife, stabbed him and fled. The motive for the stabbing was explained by other prosecution witnesses who testified that on the day before the stabbing the deceased and another man attempted to purchase narcotics from an individual who was part of the group which included Petitioner Jenkins. Their attempt to purchase the narcotics was unsuccessful because they did not have enough money and so the deceased and his companion robbed Petitioner Jenkins' companion of some money and narcotics. Defense witnesses, on the other hand, testified that there was a confrontation outside the party store and that a scuffle ensued during which the deceased was stabbed. Petitioner Jenkins testified that the stabbing was done in self-defense.

After fleeing the scene of the stabbing, Petitioner remained at large for 16 days, at which time he turned himself in to the Honorable Coleman Young, Mayor of the City of Detroit and was taken into custody.

Upon cross-examination of Petitioner by the prosecutor, the following colloquy occurred:

> "Q And I suppose you waited for the Police to tell them what happened?
>
> "A No, I didn't.
>
> "Q You didn't?
>
> "A No.
>
> "* * *

"Q (Interposing) When was the first time that you reported the things that you have told us in Court today to anybody?

"A Two days after it happened.

"Q And who did you report it to?

"A To my probation officer.

"Q Well, apart from him?

"A No one.

"Q Who?

"A No one but my --

"Q (Interposing) Did you ever go to a Police Officer or to anyone else?

"A No, I didn't.

"Q As a matter of fact, it was two weeks later, wasn't it?

"A Yes."

Upon redirect examination of Petitioner Jenkins defense counsel engaged in the following exchange:

"Q How did your arrest come about, Dennis?

"A Me and my mother and my uncle, we talked to Coleman Young the night before the 27th, and I went down and turned myself in. Me and him and his bodyguard came over to Recorder's Court and went in front of Judge Crockett."

Upon recross-examination by the prosecutor the following exchange occurred, Tr 303:

"Q Was there any special reason why you went over to the Mayor's Bodyguard and to the Mayor and everything else to surrender yourself instead of going to the Police the same day when this happened, instead of waiting two weeks to go to the Mayor?

"A Yes, it is.

"Q What is the reason?

"A Because I was afraid. Judge Gardner just had gave me probation.

"Q You were afraid of whom?

"A I was afraid what I had happened."

In his closing argument the Prosecutor made a brief reference to this two-week delay in reporting the incident, Tr 311-312; App 36a-37a:

"Now he waited two weeks, according to the testimony -- at least two weeks before he did anything about surrendering himself or reporting it to anybody. And then, after two weeks, he pulled the grand stand stunt of surrendering himself to the Mayor, because he claimed he was afraid. Of course he wasn't afraid during the two weeks, but after two weeks, he decided he was going to be afraid and he was going to surrender himself to the Mayor. I don't know what he really was afraid about. But he didn't make that very clear. He was afraid because of something that he had done. And, it might be something that might militate against his own interest. I would suggest to you that he waited two weeks before he surrendered himself because he did it after he had lined up all those Witnesses."

Petitioner asserts that these questions and comments by the Prosecutor constitute a violation of his constitutional rights under the rationale of Doyle v Ohio, supra, 426 US 610, but Respondent submits that this contention is without merit.

REASONS FOR DENYING THE WRIT

THIS CASE DOES NOT INVOLVE ANY IMPORTANT UNDECIDED QUESTIONS OF FEDERAL LAW REQUIRING CONSIDERATION BY THIS COURT SINCE THE COURT OF APPEALS WAS CLEARLY CORRECT IN HOLDING THAT DOYLE v OHIO, 426 US 610 (1976), DOES NOT APPLY TO PRE-CUSTODY, PRE-ARREST CONDUCT.

In Doyle v Ohio, 426 US 610 (1976) this Court held that the use for impeachment purposes of a defendant's silence at the time of arrest and after receiving Miranda warnings violated the Due Process Clause of the Fourteenth Amendment. Miranda v Arizona, 384 US 436 (1966) requires that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Since silence after such warnings may be nothing more than an

arrestee's exercise of the Miranda rights, "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." Doyle v Ohio, supra, 426 US at 617. Because of that insoluble ambiguity this Court held that a state prosecutor may not seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told him the story after receiving Miranda warnings at the time of his arrest.

The determinative difference between this case and Doyle is immediately apparent. In Doyle this Court referred exclusively to a defendant's silence after receiving Miranda warnings at the time of his arrest whereas in the instant case the challenged questions and comments refer to behavior occurring after the stabbing but prior to Petitioner Jenkins' arrest. Silence after an arrest may well be due to an arrestee's exercise of Miranda rights but such silence is fundamentally different than the failure to report the occurrence of a stabbing incident, a situation to which Miranda is simply inapposite. The opinion in Miranda v Arizona, supra, 384 US at 477-478 indicates that it is inapplicable in the instant circumstances:

> "The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be errected about the privilege must come into play at this point.
>
> "Our decision is not intended to hamper the traditional function of police officers in investigating crime. * * * General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the factfinding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." (footnotes and citation omitted, emphasis added).

The requirement that a custodial situation exist before Miranda rights attach was re-emphasized in Oregon v Mathiason, 429 US 492 (1977) where this Court concluded that a confession need not be suppressed where it was given by an individual who was not deprived of his freedom of action in any significant way even though the confession was given during an interview with police officers at State Police offices and the individual had been told that although he was not under arrest he was suspected of involvement in a burglary.

The Doyle decision effectuates the prophylactic rules enunciated in Miranda and so it logically follows that since Miranda does not apply to questions about Petitioner Jenkins' pre-arrest silence, Doyle too is inapplicable. By its terms Doyle applies only to questioning about post-arrest silence, 426 US at 617, and so it is apparent that the Sixth Circuit's rejection of Jenkins' allegation was clearly correct.

The cases cited by Petitioner on page 6 of the Petition do not support his contention that Doyle prohibits questioning a defendant about pre-arrest silence since in each of those cases the defendant was in custody or was otherwise deprived of his freedom of action at the time of the silence about which he was subsequently questioned.

In the instant case Respondent submits that even if the prosecutor's actions are deemed to be a violation of Doyle v Ohio, supra, they are harmless beyond a reasonable doubt, see Chapman v California, 386 US 18 (1967), because of other overwhelming evidence of Petitioner's guilt. Petitioner was charged with first degree murder but was convicted by the jury of manslaughter, the elements of which were defined for the jury by the trial court. In arriving at its verdict the jury apparently rejected the claim of self-defense which was also defined for the jury.

Although some defense witnesses claimed to have seen a struggle between the deceased and Petitioner Jenkins, other prosecution witnesses testified that the Defendant saw the deceased inside the store, waited outside for him to leave and then suddenly, without provocation or warning, stabbed him from behind. Petitioner admitted the stabbing but claimed self-defense. By its manslaughter verdict the jury indicated either that it did not believe the testimony regarding a struggle or that it believed Petitioner could have retreated and thus avoided the conflict but did not. By its manslaughter verdict the jury rejected the prosecution's theory that the murder was committed with malice aforethought and premeditation. The prosecution's questioning and comments which are here challenged under the Doyle principle relate merely to the timing of Petitioner's arrest and have no bearing on the truth or falsity of his self-defense story and therefore could not have influenced the jury's verdict.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6809

DENNIS SEAY JENKINS,

Petitioner,

v.

CHARLES ANDERSON, Warden, State Prison for Southern Michigan at Jackson, Michigan,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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CHARLES ANDERSON, Warden, State Prison for Southern Michigan at Jackson, Michigan,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

STATEMENT OF QUESTION INVOLVED

Whether consistent with the Fifth Amendment to the United States Constitution a defendant in a state criminal prosecution can be cross-examined concerning his failure to go to the police at a time before his arrest and give the same explanation of self-defense which he gave in testimony on trial.

Petitioner would answer 'no'.

STATEMENT OF THE CASE

This is a criminal case originating in the Recorder's Court for the City of Detroit in the State of Michigan in 1974.

Petitioner was charged in a one count Information with the commission of the offense of murder of the first degree in the stabbing death of one Doyle Redding (T79).*

The case was tried to a jury (T75).

Ronald Conner testified (T82ff) that on August 13, 1974 in the afternoon, he and the deceased (T82) were in an apartment at 7845 East Forest in the City of Detroit (T84) when the deceased left to go across the street to the Big D's Party Store (T84). After the deceased entered into the store, petitioner passed by the store and then came back toward the store and as the deceased stepped out of the store, petitioner stabbed deceased in the chest (T85). Deceased had no weapon and he had made no gesture toward petitioner (T86). After he was stabbed, the deceased threw a bottle at petitioner who had run away (T86). The deceased came back to the apartment and when the witness opened the door, the deceased fell and the witness 'drug' him into the apartment (T87). The deceased had a pocket knife in his hand; it was the same knife that petitoner had stabbed him with; the deceased had pulled the knife out of himself (T88). The witness identified Exh #1 as the pocket knife (T89). On cross examination, the witness testified that on August 12, petitioner was in the company of a 'guy' and two girls and that

*The T in the parentheses refers to the Transcript of testimony adduced on trial of this case in the state court; the numbers, to the pages within.

The 'a' in the parentheses refers to the Appendix; the numbers, to the pages within.

the witness and the deceased had robbed the 'guy' of $23 and some dope (T104). Petitioner was a half block away when the robbery took place (T112).

Bonnitta Hicks testified (T114ff) that it was her apartment from which the deceased left to go to the party store (T115), but that she was not looking out of the window and saw nothing (T116). She saw the deceased when he came back to the apartment; he had a knife in his hand and he was bleeding from the chest and he said 'I have been stabbed' (T118). The night before, petitioner and a guy and two girls were trying to sell some narcotics (T119). There was an objection and it was sustained (T119).

Sawait Kanluen, a forensic pathologist (T127), testified that he had performed an autopsy on the body of the deceased (T129). He found a stab wound to the heart (T130); he opined that cause of death was a stab wound to the heart causing massive bleeding (T132). The deceased had needle marks on both arms indicating that he had been a narcotics user (T132).

Robert Gaines testified (T153ff) that on August 13, 1974 he was employed in the Big D Party Store (T153). Shortly before 2:00 pm, the witness waited (T172) on a guy named 'Slim' (T173) and while doing this, the witness saw petitioner in the doorway of the store (T173-174). 'Slim' was the deceased (T174). Petitioner had first walked by the store and then he stood by the door (T175); petitioner stood and smiled (T175). When the deceased walked out of the door, petitioner 'come from behind his back' and 'plunged' at the deceased. Deceased had no weapon; he had a bag in his hand (T176). Deceased staggered back, pulled the knife out and went toward petitioner (T176). Petitioner ran (T177), and the deceased headed across the street with the knife in his hand (T177).

Willie Brunner testified (T213) that on August 12, while in the company of petitioner's sister, he was robbed by a person unknown to him of money, no narcotics.

The prosecution rested (T225).

Omar Wright testified (T227ff) that at the time in question, he was passing by the party store and he saw two men in the doorway of the store arguing; he didn't know either man; one of the men was petitioner (T229). There was a struggle; petitioner pushed the other man and started running; and the other man chased petitioner (T230). The witness didn't see a knife in anybody's hand prior to the chase (T232); while running, the other man had a knife in his hand (T231).

Fontaine Berrien testified (T244ff) that at the time and place in question, he saw two men tussling; one, the petitioner, broke and ran and the deceased chased him (T245). He saw a knife in the hands of the deceased for the first time when the deceased was chasing petitioner (T249).

Ronald Lewis testified (T254ff) that he was a PhD in psychology and that according to tests he performed on petitioner, petitioner was a left-handed person and that if he stabbed anybody, he probably would have used the left hand (T261).

Adolphus Cunningham testified (T266ff) that at the time and place in question, he was in the company of Fontaine Berrien (T266) and that he saw petitioner and another struggling at the party store and that he saw petitioner break away and run and the deceased chase him (T267).

Petitioner testified (a24ff) that he was 23 years old and single (a24). On August 12, his friend was robbed on the street and petitioner stopped the police and made a report (a25). The next day as petitioner was passing the party store, he ran into deceased who accused petitioner of following him

and of being the person who reported to the police (a27). Deceased told petitioner that petitioner was thinking about sending the police around and then the deceased came at petitioner with a knife (a27). Petitioner caught deceased's hand and tried to throw him through the window; petitioner pushed deceased up against the door (a27) and then petitioner turned and ran (a27). Petitioner recognized the deceased as one of the men who had robbed Willie Brunner the night before (a30). Petitioner had never seen Exh #1, the knife, before; petitioner was defending himself (a32,a33). Petitioner did not wait around to tell the police (a33); two days after petitioner was arrested, he first told his story to his probation officer (a34); petitioner never went to a police officer to tell his story (a34). When the deceased came at petitioner with the knife, petitioner tried to push the knife into the deceased as far as he could (a36). Petitioner surrendered to the police through the mayor of Detroit because petitioner was afraid (a37).

Petitioner rested (a38); there was no rebuttal from the prosecution (a38).

After deliberating some four and one half days, the jury returned a verdict against petitioner of guilty of manslaughter on November 7, 1974 (T367).

Petitioner was sentenced to a term of ten to fifteen years in prison, and at date hereof, petitioner remains incarcerated in State Prison for Southern Michigan at Jackson, Michigan, Charles Anderson, warden.

Petitioner appealed his conviction as a matter of right in timely manner to the Michigan Court of Appeals. Petitioner's conviction was affirmed by Order of the Michigan Court of Appeals dated May 3, 1976 which Order granted the prosecutor's motion to affirm petitioner's conviction, the Michigan Court of Appeals stating in said Order that 'the

questions sought to be reviewed [were] so unsubstantial as to need no argument or formal submission'. The question on which this Court granted certiorari was not raised to the Michigan Court of of Appeals.

Petitioner, an indigent, having no constitutional right to appointment of counsel for an appeal to the Michigan Supreme Court, a discretionary appeal, proceeded to apply for leave to appeal in the Michigan Supreme Court *in propria persona.* This application was denied by the Michigan Supreme Court by Order dated March 25, 1977. The question before this Court was raised in said application.

Petitioner, *in propria persona,* then filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan, Southern Division (a5).

Counsel was appointed by the district court for petitioner, the issues were orally argued, cross-motions for relief were filed, and the district judge dismissed the petition for a writ of habeas corpus (a17) and entered judgment (a18).

Petitioner appealed from this judgment to the United States Court of Appeals for the Sixth Circuit. The judgment of the district court was affirmed (a19).

Petitioner filed a Motion for Leave to Proceed in *Forma Pauperis* and a Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in this Court on June 7, 1979.

By Order of this Court dated October 1, 1979, said Motion for Leave to Proceed in Forma Pauperis and Petition for Certiorari were granted (a57).

SUMMARY OF ARGUMENT

Every person is at all times, whether he is under arrest or not, whether he is formally charged with commission of crime or not, invested under the Fifth Amendment to the United States Constitution with a right to remain silent and not incriminate himself.

Petitioner during the two week period between the occurrence of the homicide and his being taken into police custody was invested under the Fifth Amendment to the United States Constitution with a right to remain silent and not incriminate himself.

During this two week period, petitioner was under no legal obligation to go to the police and offer a statement exculpating himself or, for that matter, incriminating himself.

Petitioner's pre-arrest silence was not in any manner whatever inconsistent with his trial testimony that he had acted in self-defense in the premises.

It was an infringement of petitioner's right under the Fifth Amendment for the prosecutor on trial to elicit from petitioner on cross-examination that he had remained silent during the pre-arrest period and had not sought out the police to volunteer a statement of self-defense, and for the prosecutor to refer to the fact of silence in his argument to the jury and suggest that petitioner's trial testimony was false and contrived because he had remained silent during the pre-arrest period.

Such infringement deprived petitioner of due process and a fair trial under the 14th Amendment to the United States Constitution because it deprived him of his right not to incriminate himself under the Fifth Amendment to the United States Constitution.

Such infringement was not harmless error beyond a reasonable doubt.

CONCLUSION

Petitioner was deprived of his right under the Fifth Amendment to the United States Constitution against self-incrimination and to due process and a fair trial under the Fourteenth Amendment to the United States Constitution when the prosecutor in his state trial cross-examined petitioner concerning his pre-arrest silence and referring to the subject in his argument to the jury.

A writ of habeas corpus must issue to free petitioner from his incarceration in violation of the federal constitution.

ARGUMENT

A defendant in a state criminal prosecution cannot, consistent with the Fifth Amendment to the United States Constitution, be cross-examined concerning his failure to go to the police at a time before his arrest and give the same explanation of self-defense which he gave in testimony on trial.

Petitioner, on cross-examination by the prosecutor, had repeated that he had acted in self-defense when he stabbed the deceased (a33).

The prosecutor then asked petitioner the following questions:

Q [By prosecutor]: And I suppose you waited for the Police to tell them what happened?

A No, I didn't.

Q You didn't?

A No.

Q I see. And how long was it after this day that you were arrested, or that you were taken into custody? (a33)

After some wrangling, a date was established; it appeared that a period of two weeks elapsed from the date of the homicide and petitioner's being taken into custody (a34).

Then the prosecutor asked petitioner the following questions:

Q [By prosecutor] (Interposing) When was the first time that you reported the things that you have told us in Court today to anybody?

A Two days after it happened.

Q And who did you report it to?

A To my probation officer.

Q Well, apart from him.

A No one.

Q Who?

A No one but my —

Q (Interposing) Did you ever go to a Police Officer or to anyone else?

A No, I didn't.

Q As a matter of fact, it was two weeks later, wasn't it?

A Yes. (a34)

On re-direct examination, petitioner testified that his arrest came about as follows: Petitioner turned himself in to the Mayor of Detroit, and petitioner and the Mayor and the Mayor's bodyguard went before a judge of the Recorder's Court for the City of Detroit (a37).

On re-cross examination, the prosecutor asked petitioner the following questions:

Q [By prosecutor]: Was there any special reason why you went over to the Mayor's Bodyguard and to the Mayor and everything else to surrender yourself instead of going to the Police the same day when this happened, instead of waiting two weeks to go to the Mayor?

A Yes, it is. (a37).

Q What is the reason?

A Because I was afraid. Judge Gardner just had gave me probation.

Q You were afraid of whom?

A I was afraid what I had happened.

Q But you hadn't done anything. You were just defending yourself.

A But, I don't know anything about the law. (a38)

Petitioner's trial counsel did not object to any of the above questions on the basis of a violation of petitioner's right under the 5th Amendment to the United States Constitution, nor did trial counsel move for a mistrial.

In his opening summation to the jury, the prosecutor argued as follows:

'Now he [petitioner] waited two weeks, according to the testimony — at least two weeks before he did anything about surrendering himself or reporting it to anybody. And then, after two weeks, he pulled the grand stand stunt of surrendering himself to the Mayor, because he claimed he was afraid. Of course he wasn't afraid during the two weeks, but after two weeks, he decided he was going to be afraid and he was going to surrender himself to the Mayor. I don't know what he really was afraid about. But he didn't make that very clear. He was afraid because of something that he had done. And, it might be something that might militate against his own interest. I would suggest to you that he waited two weeks before he surrendered himself because he did it after he had lined up all those witnesses.' (a43)

* * *

'I suggest that he surrendered himself after he had those two Witnesses to line up all of those Witnesses that you heard testify.' (a43)

Petitioner's trial counsel argued in response to the prosecutor as follows:

'Now the Defense presented some witnesses in this case whom, by investigation, we came up with. Now I don't want to fault the Police Officers. We had the Police Officers on the stand. He stated, yes, he went out in the area and sought to get statements. But he was unable to do so because the people were uncooperative. I think it is unfortunate that this type of uncooperation is given to the Police Department. But it is a fact, and in our office, we have an investigative staff which are very able to relate to the people of the community. Maybe, a little bit better. And they seek to bring in — Now, we sought to bring in other people besides the people that 'the Prosecution brought in. And that was to get all of the facts about this case.' (a48).

In his rebuttal argument, the prosecutor made the following statements:

'Yes, I agree with counsel that it is bad that people are uncooperative with the Police, that they don't tell the Police things that they saw. And, if there were Witnesses there, why did they not give the Police their names and tell what they saw?

'Well, you will note that every Witness that the Defense did present allegedly as a person who saw what happened, neither waited for the Police to come, or went to the Police. They never came out of the woodwork until the trial today, as far as we know. Why? Why, if they were simply people disinterestedly telling what they saw? Why did they not go to the Police or wait for the Police to come and tell them what they saw the way Mr. Gaines did? The way his aunt did?

* * *

'But, as far as these Witnesses that were presented to you, how did the Defense know what they were? They never gave their names to anybody. You remember what

> I told you in my opening argument? Because I suggested to you that the Defendant had been in contact with them for two weeks before he surrendered, and discussing with them the possibility that they had seen things in a certain way. And then he surrendered. And these Witnesses are presented to you as being people who are testifying to you as to what they really saw! (a54-55)

There were no objections to the above remarks of the prosecutor by petitioner's trial counsel on the basis of petitioner's Fifth Amendment rights, and no motion for a mistrial was made.

It might appear that petitioner's claim herein is barred by the rules promulgated in *Francis v. Henderson,* 425 U.S. 536 (1976) and *Wainwright v. Sykes,* 433 U.S. 72 (1977).

However, two facts militate against this position. First, the Michigan Supreme Court did not reject petitioner's claim on the basis that the question was not preserved by timely objections at trial; the Michigan Supreme Court denied petitioner's application for leave to appeal on the basis that the Court was not persuaded that the Court should review the questions presented, and neither the United States District Court nor the Court of Appeals for the Sixth Circuit rejected petitioner's claim on the basis that the state contemporaneous objection rule was not observed. Cf *Bradford v. Stone,* 594 F.2d 1294, 1296 [foot note 2] (CA9 1979)

Second, that although as a general rule it is necessary for the preservation of a question for appellate review that a timely objection or mortion be made in the trial court under the rules of appellate procedure in the State of Michigan, still the appellate courts of Michigan may in the interests of justice recognize plain error where such error affects substantial rights of the defendant. *People v. Holmes,* 292 Mich. 212 (1940); *People v. Dorrikas,* 354 Mich. 303 (1958); *People v. Mahley,* 390 Mich. 57 (1973).

It has been held that if state rules of appellate procedure allow the state to consider plain error in the absence of preserving objections at trial, the same plain error may be considered by a federal court in a habeas corpus proceeding and is not barred by *Wainwright v. Sykes, supra. Miller v. State of North Carolina,* 583 F.2d 701 (CA4 1978).

o o o

Petitioner had a right under the *Fifth Amendment to the United States Constitution* not to 'be compelled in any criminal case to be a witness against himself'. Through the operation of the *Fourteenth Amendment to the United States Constitution,* the state courts of Michigan could not infringe upon this right of petitioner. *Malloy v. Hogan,* 378 U.S. 1 (1964).

It is petitioner's position that when the prosecutor in his state trial brought out in cross-examination of petitioner that petitioner while at liberty during the period between the occurence of the homicide and his arrest did not seek out the police or any other authority to give his explanation that he had acted in self-defense in the homicide and that when the prosecutor adverted to this point in his argument to the jury, petitioner was deprived of his said Fifth Amendment right.

o o o

The privilege against self-incrimination embodied in the Fifth Amendment does not operate solely to bar compelled testimony of a defendant on the trial where he is the accused. This was made clear by the Court in *Kastigar v. United States,* 406 U.S. 441, 444-445 (1972):

> 'The privilege [against self-incrimination] reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or

adjudicatory; and it protects against all disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.' [Footnotes omitted.]

The breadth of the privilege was defined by the Court in *Malloy v. Hogan, supra:*

'The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement - the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.' 378 U.S. at 8.

The breath of the privilege was also delineated by the Court in *Counselman v. Hitchcock,* 142 U.S. 547, 573-574 (1892) where the Court quotes with approval from Emery's Case, 107 Mass. 172 (1971):

'"By the narrowest construction, this prohibition extends to all investigations of an inquisitorial nature, instituted for the purpose of discovering crime, or the perpetrators of crime, by putting suspected parties upon their examination in respect thereto, in any manner, although not in the course of any pending prosecution. But it is not even thus limited. The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against himself as a confession of crime, or an admission of facts tending to prove the commission of an offense by himself, in any prosecution then pending, or that might be brought against him therefor, such disclosure would be an accusation against himself, within the meaning of the constitutional provision."'

And the Court in *Ullman v. United States,* 350 U.S. 422, 426 (1956) said that the privilege against self-incrimination of the Fifth Amendment 'must not be interpreted in a hostile or niggardly spirit'.

Thus, it should be clear that if the state cannot compel a defendant upon his trial to be a witness against himself and cannot summon a person before a grand jury or any adjudicatory or investigatory body and compel him to give evidence against himself and cannot compel a person to answer questions of investigating police officers, then *a fortiori* it must follow that the state cannot establish a rule of criminal procedure and evidence which requires a person to seek out the police or the state authorities and give to them exculpatory explanations which nonetheless contain incriminating material concerning an event which might be the basis of a criminal prosecution on pain that the person will be impeached on his trial for remaining silent instead when he undertakes to make the exculpatory explanation from the witness stand.

The state cannot establish such rule because it would either deprive the person of his Fifth Amendment right not to incriminate himself or it would penalize him for exercising his right not to incriminate himself. '[L]egislation cannot abridge a constitutional privilege', *Counselman v. Hitchock, supra,* 142 U.S. at 580; and an accused cannot be forced to choose between two constitutional rights as to which he will invoke on pain of being deprived of his right to invoke the other, *Jones v. United States,* 362 U.S. 309 (1960); *Simmons v. United States,* 390 U.S. 377 (1968).

Thus, if a person can be impeached upon his trial for crime with his pre-arrest silence when he undertakes to give an exculpatory explanation from the witness stand, then such person is placed in the position of choosing between the

exercise of his Fifth Amendment right not to incriminate himself and his Sixth Amendment right to present evidence on his trial to meet the charge against him.

In the case at bar, had petitioner sought out the police or the authorities and given to them the same exculpatory version of events as he gave on trial, petitioner would have incriminated himself at least to the extent of admitting that he was present at the scene of the homicide and that he inflicted the stab wound which was the cause of the deceased's demise. That petitioner was the person who inflicted the stab wound and that petitioner did in fact inflict the stab wound which caused the death of the deceased were elements of the crime of murder in the State of Michigan. *People v. Morrin,* 31 Mich. App. 301, 310-311 (1971); *People v. MacPherson,* 323 Mich. 438, 452 (1949).

This was sufficient for petitioner's invoking his right under the Fifth Amendment not to incriminate himself by not seeking out police or authorities and giving them his exculpatory version of events. Petitioner did not have to assume that the police had witnesses who would place him at the scene of the crime or who would establish that he stabbed the deceased. An accused has the right to hear the entire case of the prosecution before he decides whether he will testify in his own behalf. *Brooks v. Tennessee,* 406 U.S. 605 (1972).

And a person has the right to withhold admitting even one fact which might aid the prosecution in obtaining his conviction. This was made clear by the Court in *Counselman v. Hitchcock, supra,* where the Court quoted with approval Chief Justice Marshall in Burr's trial:

> 'According to their statement, [the counsel for the United States] a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable, case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact, of itself, might be unavailing but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thense, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed or is attainable against any individual the court can never know. It would seem, then, that the court ought never to compell a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws.' [Material in parenthesis by the Court.] 142 U.S. at 566.

Thus, in the case at bar, petitioner had an altercation with the deceased and acting in self-defense against an attack by the deceased upon him, petitioner stabbed and killed the deceased. Petitioner could not know whether the police had witnesses who could identify petitioner as the person who had stabbed the deceased. If petitioner had gone to the police with his exculpatory version of events, he might have supplied the only evidence the police had available as to the identity of the person who had stabbed the deceased, and having identified himself as that person, petitioner then would have the burden of proving that he had acted in self-defense.

This dilemmatic situation was recognized by Griswold in *The 5th Amendment Today* (Harvard University Press 1955) at page 9 where he stated that the 5th Amendment protected the innocent:

> '[A]nother purpose of the Fifth Amendment is to protect the innocent. But how can a man claim the privilege if he is innocent? How can a man fear he will incriminate himself if he knows he has committed no crime? This may happen in several ways. A simple illustration will show the possibility.
>
> 'Consider, for example, the case of the man who has killed another in self-defense, or by accident, without design or fault. He has committed no crime, yet his answer to the question whether he killed the man may well incriminate him. At the very least it will in effect shift the burden of proof to him so that he will have to prove his own innocence. Indeed, the privilege against self-incrimination may well be thought of as a companion to our established rule that a man is innocent until he has been proved guilty.'

That the privilege against self-incrimination and the presumption of innocence are related is a thought which deserves careful consideration.

It cannot be that the presumption of innocence springs into being only when a person is put on trial on a criminal charge. The presumption of innocence invests every member of society whether he is charged with crime or not. The principle of the presumption of innocence is one of the oldest known to the legal systems of mankind as was shown by the Court *in Coffin v. United States,* 156 U.S. 432, 453-460 (1895), and the most accurate statement of it was that quoted by the Court from Greenleaf On Evidence:

> 'Greenleaf thus states the doctrine: "As men do not generally violate the Penal Code, the law presumes every man innocent; but some men do transgress it, and therefore evidence is received to repel this presumption. . ." On Evidence, pt. 1, §34.'

To state that persons who are charged with crime are presumed to be innocent but persons not charged, not, is to prove the untenability of the proposition.

All persons not convicted of crime are presumed to be innocent of the commission of crime, and since under the decisions of this Court it is clear that 'the accusatorial system has become a fundamental part of the fabric of our society', *Malloy v. Hogan, supra,* 378 U.S. at 10, it must follow that all persons, even those not charged with crime, have the right to remain silent and not incriminate themselves in the face of any accusation or set of suspicious circumstances, and instead have the right to have the state prove each and every fact necessary to constitute the charge against them beyond a reasonable doubt without any help from the accused, *In re Winship,* 397 U.S. 358 (1970).

The same principle was put more forcefully by the Court in *People v. Bigge,* 288 Mich. 417, 420 (1939):

> 'The time has not yet come when an accused must cock his ear to hear every damaging allegation against him and, if not denied by him, have the statement and his silence accepted as evidence of guilt. There can be no such thing as confession of guilt by silence in or out of court.'

Thus, it can be seen that petitioner while at liberty between the time of the occurence of the homicide and his being taken into custody had the benefit of the presumption of innocence and the right not to incriminate himself.

It was fundamentally unfair of the State on trial to suggest to the jury that petitioner was guilty of the crime charged because he had exercised his right to remain silent and not incriminate himself and to stand on his presumption of innocence and demand that the State as accuser prove its accusation with no help from the petitioner.

The 6th Circuit Court of Appeals ruled in the case at bar

that since 'the petitioner was not questioned concerning his silence while under arrest or otherwise in custody', the principle of *Doyle v. Ohio,* 426 U.S. 610 (1976) did not apply, the Court relying on its opinion in *Bradley v. Jago,* 594 F.2d 1100 (CA6 1979). In that case, a habeas corpus proceeding where the defendant had testified on trial that he had stabbed the deceased in self-defense, the defendant 'didn't stay and explain to the police' and he didn't offer an exculpatory explanation to the police officer who answered his telephone call of inquiry as to the condition of the victim, as the prosecutor was at pains to elicit from the defendant. The Court commented on *Doyle v. Ohio, supra,* as follows:

> 'We do not read *Doyle* to prohibit an attempt to impeach a defendant by cross-examination concerning his failure to offer an exculpatory explanation when the opportunity to do so came before he was in custody and before he had received any advice of his right to remain silent.
>
> * * *
>
> '*Doyle* applies to those situations in which a defendant is entitled to rely on the implicit assurance of the *Miranda* warnings that silence carries no penalty. (Citation omitted.) In contrast, where a defendant has not received warnings, there is nothing unfair in permitting jurors to hear that a defendant initially failed to offer his exculpating version of events after they have heard his version at trial. *It is not to be presumed that failure to explain at that time resulted from an exercise of the Fifth Amendment right to remain silent.*' [Emphasis added.]

Of course, the Sixth Circuit Court was in a sense perfectly correct in its interpretation of *Doyle*: the facts were that the defendant in that case had been arrested and he had been given his *Miranda* warnings and in the face of them, he had remained silent, and this Court said in *Doyle*:

> 'Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. (Citation omitted.) Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.
>
> * * *
>
> 'We hold that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment.' 426 U.S. at 617-618, 619.

But the point surely is that the Court in *Miranda v. Arizona,* 384 U.S. 436 (1966) did not create any new constitutional rights nor invest existing ones with attributes not inhering in them when the Constitution was adopted. 'Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.' *Ullmann v. United States,* 350 U.S. 422, 428 (1956).

This Court in *Miranda* explicitly stated that '[w]e start here, as we did in *Escobedo,* with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings', and the Court was careful to delineate that its purpose was to treat with situations where these rights 'were put in jeopardy' 'through official overbearing', 384 U.S. at 442, and 'to insure that what was proclaimed in the Constitution had not become but a "form of words" (citation

omitted) in the hands of government officials'.

The Court in *Miranda* was primarily concerned with the Fifth Amendment right against self-incrimination and the Sixth Amendment right to assistance of counsel, and the only fair inference from the Court's opinion is that every person who is taken into police custody at the time he is taken into police custody is cloaked with the Fifth Amendment right not to incriminate himself and with the Sixth Amendment right to assistance of counsel. The Court's purpose in *Miranda* was to lay down rules of police conduct to insure that an arrested person will not be shorn of these two rights by overbearing police conduct. The Court ruled that before a police officer can properly interrogate a person under custodial conditions, he must state to that person that he does have the right to remain silent and not incriminate himself and that he does have the right to the assistance of counsel.

The point is that the police officer does not create these two rights for the person in custody nor does the police officer with his statement invest the person in custody with any rights which he didn't have before he was taken into custody. *Miranda* merely requires the interrogating police officer to advise the person in custody of those rights with which the Constitution invested him even before he was taken into custody so that the arrested person can exercise these rights or waive them in an act of informed and unfettered and uncoerced choice.

To suggest that a person under arrest has a constitutional right to remain silent and not incriminate himself and a constitutional right to assistance of counsel but that a person not under arrest does not have these two constitutional rights is to suggest that a person who is under arrest has greater and more numerous constitutional rights than a person not under arrest, a suggestion that teeters on the verge of absurdity. If this be so, we are all better advised to get ourselves arrested

for we shall obtain greater rights for our better security against state action.

To state that there is an implicit assurance in *Miranda* warnings that the exercise by a person of his Fifth Amendment right to remain silent will carry no penalty does not establish the reverse of the proposition, namely, that the exercise by a person of his Fifth Amendment right to remain silent in the absence of the giving of *Miranda* warnings will carry penalty. Surely a person taken into police custody who is fully cognizant of all of his constitutional rights has the right to remain silent in the exercise of his Fifth Amendment right while he is in police custody whether any police officer advises him of that right or not and whether any police officer interrogates him or not. And a person may so exercise this right without fear of penalty. To tie the condition of no penalty for the exercise of the Fifth Amendment right to silence to the delivery of *Miranda* warnings by a police officer is to contradict precedents of this Court.

Thus, in *Grunewald v. United States,* 353 U.S. 391 (1957), Halperin was not advised, from what appears in the opinion of the case, by a police officer or by the grand jury, that he had a right to remain silent in the face of the grand jury questions. Yet, he claimed his privilege under the Fifth Amendment and the Court ruled that it was error on trial for the government to impeach him with his silence before the grand jury when he undertook to give exculpatory answers to questions similar to those asked of him by the grand jury from the witness stand.

And several courts have held that there can be no different consequences following from an arrestee's silence exercised before *Miranda* warnings were given to him than following silence exercised after *Miranda* warnings were given. Thus, in *United States v. Impson,* 531 F.2d 274, 277-278 (CA5 1976), the Court said:

'Government counsel also points out that the silence in question in *Hale* [United States v. Hale, 422 U.S. 171 (1975)] was after the defendant had received *Miranda* warnings, while that of Impson occurred prior to any such warnings. Once more, we find the argument advanced unpersuasive. The contention is that practically *Miranda* warnings tend to inhibit speech and that silence after such warnings is less inconsistent with innocence than silence in the absence of such warnings. This argument conflicts with the whole purpose and policy of *Miranda* by rewarding the police for failure to inform an accused person promptly upon his arrest of his right to remain silent. Silence is the right of the innocent as well as of the guilty, (citation omitted). In the face of the numerous legitimate reasons for an arrested person to elect to remain silent we decline to attempt an enumeration of instances in which silence by an arrested person may be of probative value to the government's case. We discern no merit in the appellee's argument that silence in the absence of *Miranda* warnings raises a greater inference of guilt than silence following such warnings.'

And in *United States v. Henderson*, 565 F.2d 900, 905 (CA5 1978), the Court said:

'The silence of an accused who has not been given a *Miranda* warning cannot be used against him to impeach his credibility, unless his silence is inconsistent with his innocence and inconsistent with his exculpatory statement given at trial. Otherwise, it lacks significant probative value and carries with it an intolerable prejudicial impact.'

See also: *Bradford v. Stone*, 594 F.2d 1294 (CA9 1979); *United States ex rel Allen v. Rowe*, 591 F.2d 391 (CA7 1979); *People v. Antoine*, 415 N.Y.S.2d 77 (1979); *State v. Rios*, 592 P.2d 1299 (Ariz. 1979).

If indeed the Constitution in the Fifth Amendment confers on every person the right to remain silent in the face of

accusation, if the Fifth Amendment confers on every person the right not to incriminate himself, then it is always dangerous for a court to examine into the question whether his silence was inconsistent with innocence because such examination undermines the Fifth Amendment guarantee itself by converting it from a shield into a sword of condemnation. If a person's exercise of his constitutional right to silence can be construed by a court as being inconsistent with innocence, then a person before he exercises his constitutional right to silence must first decide whether a court might construe his silence as being inconsistent with innocence and such person might be placed in a dilemmatic position in which he damns himself by speaking and he damns himself by remaining silent. Of what value can the protection of the Fifth Amendment against self-incrimination be if it can be pulled away from a person by a court's ruling that its invocation by the person is inconsistent with his innocence.

Most usually when a person invokes his Fifth Amendment right to remain silent, it is in a non-judicial setting, the person being in custody or not, in circumstances where all of the evidence against him on a particular charge or suspicion has not been marshalled. However, when a defendant on his trial elects to invoke his Fifth Amendment right to remain silent and not take the witness stand, all of the evidence against him has, presumably, been marshalled and presented to the court and jury. It would seem to be more logical for a court to rule in most cases that the accused's silence in the latter circumstances was inconsistent with innocence than in the former and to throw the principle of *Griffin v. California*, 380 U.S. 609 (1965) out of the window and allow the prosecutor to make whatever comments he wished on the accused's failure to testify.

However, the rationale of *Griffin v. California* seems to

be that no matter how overwhelming the evidence against the accused might be, no matter how loudly the evidence calls for reply or explanation from the accused, no matter how inconsistent with innocence the accused's refusal to testify might appear, still he has an absolute right under the Fifth Amendment to remain silent and it is impermissible for court or prosecution to damn the accused for exercising that right by making comment to the jury about it.

And the same policy should be adopted by the Court regarding the exercise by a person of his Fifth Amendment right to silence made under any circumstances.

The words of the Court in *People v. Bobo,* 390 Mich. 355, 360, 361 (1973) can be read with profit on this point:

> 'Whether his [defendant's] silence was prior to or at the time of arrest makes little difference - the defendant's Fifth Amendment right to remain silent is constant.
>
> * * *
>
> 'If silence in the face of specific accusation 'may not be used [against a defendant], it would be a strange doctrine indeed that would permit silence absent such an accusation to be used as evidence of guilt.'

Consideration of the analagous situation involving a person's Sixth Amendment right to assistance of counsel would be helpful. In *United States ex rel Macon v. Yeager,* 476 F.2d 613 (CA3 1972), the defendant, on the morning after the homicide, and *before his arrest,* called his attorney. The prosecutor on trial in argument to the jury suggested that the defendant's calling his attorney was not the act of an innocent man. The Court found that this suggestion was an impermissible infringement of the defendant's Sixth Amendment right to the assistance of counsel. See also: *Zemina v. Solem,* 573 F.2d 1027 (CA8 1978).

Adoption of a rule that a defendant who testifies at his trial

can be impeached with his silence before arrest can lead to absurb results. Consider a situation where two men are surprised by the police ostensibly in the commission of a crime. The two men break and run but one is immediately captured and the other makes good his escape. The captured man is immediately given his *Miranda* warnings and he remains silent. The other man remains at liberty for two weeks before surrendering to police custody. Under these circumstances, according to the rule laid down in the case at bar by the Sixth Circuit, the captured man can take the witness stand and present a defense to the jury with full confidence that he will not be impeached with his silence at the time of his arrest, while the man who was at liberty for two weeks can take the witness stand in his own defense only at the price of being impeached with his failure to come forward during those two weeks with the same explanation he is to give from the witness stand.

And consider a situation wherein the newspapers reliably report prominently on the front pages that several persons have gone to the prosecutor to complain that a prominent public official had extorted campaign contributions from them in violation of the Hobbs Act. The prosecutor then investigates the allegations for two weeks with his progress reported daily in the newspapers including the uncovery of seemingly incriminating or suspicious facts. The prosecutor recommends the issuance of a warrant of arrest for the public official and it is duly issued. On the day of the issuance of the warrant, the public official is out of town on business and when informed of the issuance of the warrant, states that he will be returning to town in three days and will then surrender to the prosecutor for arraignment. From start to finish, the public official makes no comment whatever and does not ever in any manner make attempt to get in touch with the

prosecutor or the police to 'tell his side of the story'. Can we say that the ends of due process are met if we allow the prosecutor to impeach the public official on his trial with his pre-arrest silence when he takes the stand 'to give his side of the story'?

In such situation, the public official, during the period of investigation and after the warrant had issued and while he was still not arrested, even with the advice and assistance of counsel, and without knowing the exact nature of the accusations made against him and without knowing the nature of the evidence against him, would have to decide whether he would take the stand at his trial if there was to be a trial. If he decided that he would take the stand on trial, he would have to decide precisely what his defense on trial would be, because he certainly would not want to make a pre-arrest exculpatory statement to the prosecutor which would prove to be at variance with what he later said on trial from the witness stand.

It can readily be seen that the public official would be placed in an impossible position. On trial, after the prosecution has presented its case *in toto,* an accused can make an informed decision whether it is, first, necessary for him to testify in refutation of the prosecution's charges, and, second, whether it is advisable for him to waive his Fifth Amendment privilege to remain silent. But during the period prior to arrest, without the accused's knowing the precise substance of the accusations made against him and without knowing whether formal charges will be brought against him, it is impossible for the accused to decide, first, whether it is necessary for him to make a statement refuting the accusations against him, and, second, whether it is advisable for him to waive his Fifth Amendment privilege not to incriminate himself.

Furthermore, if a person heard that the police were looking

for him on a particular charge or that there was a warrant for his arrest on a particular charge and this person wanted to make an explanation to the police of an exculpatory nature and he went to the nearest precinct police station and announced that he understood the police were looking for him on a particular charge and that he wanted to make a statement, would not the police be under obligation to warn that person that he had a right to remain silent?

In *Miranda v. Arizona, supra,* the Court said:

> 'There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.' 384 U.S. at 478

Apart from the fact that the above is *dictum,* it can be reasonably argued that serious questions of the voluntariness of a statement made to the police can be raised when it is shown that a warrant for the arrest of an individual has issued and that the law requires a person to seek out the police and inform them of the same facts which he intends to testify to on trial on penalty that his credibility will be attacked on trial for his failure to do so.

The impeachment of petitioner in the case at bar with his pre-arrest silence cannot be justified on the basis that his silence was inconsistent with his exculpatory testimony on trial.

In *United States v. Hale,* 422 U.S. 171, 176 (1975), the Court said:

> 'A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness. As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent. (Citation omitted.) If the Government

> fails to establish a threshold inconsistency between silence at the police station and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded.'

The Court in *Hale* went on to conclude that silence after warnings that the defendant had a right to remain silent was ambiguous and devoid of any probative value.

In *United States v. Harp,* 513 F.2d 786, 790 (CA5 1975), the Court said:

> 'Total inconsistency is the criterion. If any rational explanation for the defendant's invocation of his Fifth Amendment privilege exists, the prosecution's impeachment use of a failure to speak would be error.'

See also: *United States ex rel Allen v. Rowe, supra; United States v. Henderson, supra.*

A rational explanation for petitioner's pre-arrest silence in the case at bar could be that petitioner didn't know that he had an obligation to go to the police and give an exculpatory statement. Because of the intense and universal publicity given to the *Miranda v. Arizona* case in the media in this country, many person have become aware of the fact that they have a right under the Fifth Amendment to remain silent. However, it would be safe to say that very few persons know that they have an obligation to seek out the police and give them an exculpatory statement when they hear of an accusation made against them, if indeed there is such obligation in law. Most person in their misguided folk wisdom would probably say 'If I've got a right to remain silent, how can I have an obligation to speak?'

Thus, there is no basis in the case at bar to say that petitioner's impeachment with his pre-arrest silence was proper because such silence was inconsistent with his exculpatory testimony on trial.

Nor can it be said that the error here complained of was

harmless under the doctrine of *Chapman v. California,* 386 U.S. 18 (1967).

Not only did the prosecutor pointedly and forcefully elicit from petitioner the fact that he had exercised his right to silence before he was arrested, and not only did the prosecutor advert to this fact in his argument to the jury, but the prosecutor engaged in a systematic exploitation of the theme that all defense witnesses were lying in their testimony on trial - the petitioner and the witnesses whom he called - because neither the petitioner nor his witnesses went to the police with their stories at any time before trial.

Thus, of Fontaine Berrien, a witness called by petitioner, who testified to having seen the struggle between petitioner and the deceased, the prosecutor asked the following questions on cross-examination:

Q [By prosecutor] Were you there when the Police came?

A No.

Q Oh, you weren't?

A No.

Q And you never gave the Police your name or anything?

A No.

Q You never went to the Police Station and told them what you saw?

A No. (T251)

Q You never stopped a Scout Car and told them what you saw?

A No.

Q Uh-huh. (T252)

Of the witness Adolphus Cunningham, also called by the petitioner, who testified that he had seen the struggle between the petitioner and the deceased, the prosecutor asked the

following questions on cross-examination:

Q [By prosecutor]: This information, which you saw?

A Yes.

Q How long was this after you went to the Police that day and told them what you saw?

A I didn't go to the Police.

Q You didn't go to the Police?

A I didn't go to the Police. (T271)

This was improper cross-examination by the prosecutor for no inference can be drawn from the fact that a witness did not go to the police. *United States v. Young,* 463 F.2d 934, 938 (CADC 1972).

Thus, it can be seen that the prosecutor's strategy was quite broad: impeach the testimony of petitioner with his pre-arrest silence and impeach petitioner's witnesses with their pre-trial silence and then argue to the jury not only the unreliability of the testimony of the petitioner and of his witnesses because of their silences, but allege that they conspired to conjure false testimony.

The question is what was the probable effect of the prosecutor's tactics on the jury's verdict. In the case at bar, the key issue was whether petitioner had acted in self-defense. Petitioner's credibility was all-important.

In a similar context, where the defendant had claimed in his testimony on trial that he had acted in self-defense and the prosecutor had argued to the jury that if this were so, defendant would have said so when he spoke to the police, the Court, in granting habeas corpus, said:

> 'Thus, we cannot say beyond a reasonable doubt that, absent the prosecutor's improper reference to Reid's earlier silence, the jury would have rejected Reid's version of the facts. The case turned entirely on credibility, and the Commonwealth's Attorney used an unconstitutional means to attempt to discredit the defendant's testimony. Accordingly, the error cannot be considered harmless.'

Reid v. Riddle, 550 F.2d 1003, 1004 (CA4 1977).

In *Chapman v. United States,* 547 F.2d 1240, 1249-1250 (CA5 1977), the Court laid down the following criteria to judge the harmlessness *vel non* of improper impeachment with silence:

> 'When the prosecution uses defendant's post-arrest silence to impeach an exculpatory story offered by defendant at trial and the prosecution directly links the implausibility of the exculpatory story to the defendant's ostensibly inconsistent act of remaining silent, reversible error results even if the story is transparently frivolous. (Citations omitted.)
>
> 'When the prosecutor does not directly tie the fact of defendant's silence to his exculpatory story, *i.e.,* when the prosecutor elicits that fact on direct examination and refrains from commenting on it, or adverting to it again, and the jury is never told that such silence can be used for impeachment purposes, reversible error results if the exculpatory story is not totally implausible or the indicia of guilt not overwhelming. (Citation omitted.)
>
> 'When there is but a single reference at trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error.'

Petitioner's case herein instantiates the first rule above.

The evidence against petitioner was not overwhelming. At least the jury apparently didn't think so: they took four and a half days to return a verdict of manslaughter where the charge in the case was murder of the first degree. The prosecutor deliberately elicited the fact of petitioner's pre-

arrest silence on cross-examination and linked it in argument to the jury not only to the implausibility of petitioner's exculpatory testimony but to subornation of perjury of his witnesses. And petitioner's version of events was not frivolous in the least.

The prosecutor's forceful, extensive and repeated references to pre-trial silence by petitioner and his witnesses as evidence of the untruthfulness of their testimony on trial 'carried with it an intolerable prejudicial impact'. *United States v. hale, supra,* 422 U.S. at 180; *United States v. Impson, supra,* 531 F.2d at 279.

RELIEF SOUGHT

This Court should reverse the Order of the United States Circuit Court of Appeals for the Sixth Circuit and remand the case to the United States District Court for the Eastern District of Michigan, Southern Division, with instructions to grant petitioner's petition for a writ of habeas corpus conditioned upon the State of Michigan granting petitioner a new trial.

Respectfully submitted,

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Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-6809

DENNIS SEAY JENKINS,

Petitioner,

v

CHARLES ANDERSON, Warden, State Prison for Southern Michigan at Jackson, Michigan,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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OPINIONS BELOW

Defendant Jenkins was convicted by a jury of manslaughter on November 20, 1974 in the Recorder's Court of Detroit, Michigan. On appeal to the Michigan Court of Appeals, *People* v *Jenkins*, No. 22715 (May 3, 1976) the Court granted the State's Motion to Affirm the conviction in an unreported per curiam order, "for the reason that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission." In another unreported per curiam order dated June 16, 1976 the Michigan Court of Appeals, one judge of the three-judge panel dissenting, denied Defendant's Application for Rehearing, "for lack of merit in the grounds presented." The Michigan Supreme Court in a per curiam order with one justice dissenting, *People* v *Jenkins*, 399 Mich 874 (No. 58452, March 25, 1977) denied Defendant's Applica-

tion for Leave to Appeal, "because the appellant has failed to persuade the Court that the questions presented should be reviewed by this Court." An Application for Reconsideration was denied, "because it does not appear to the Court that said order was entered erroneously." *People* v *Jenkins*, 401 Mich 809 (No. 58452, August 31, 1977).

In a Judgment and Order of Dismissal dated November 13, 1978 the United States District Court for the Eastern District of Michigan, Southern Division, adopted the findings and conclusions contained in the Magistrate's Report and dismissed Defendant's Petition for Writ of Habeas Corpus. *Jenkins* v *Anderson, Warden*, docket no. 7-72690. (App 17, 18). In an order filed May 4, 1979 the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court. *Jenkins* v *Anderson, Warden*, docket no. 79-1011. (App 19). A rehearing was denied by the Court of Appeals in an order filed May 29, 1979. (App 21).

JURISDICTION

The order of the Court of Appeals affirming the Judgment of Dismissal entered by the District Court was entered on May 4, 1979 and a Motion for Rehearing was denied by an order dated May 29, 1979. In a timely Petition for Writ of Certiorari this Court's jurisdiction was invoked under 28 USC § 1254(1). On October 1, 1979 this Court granted the Petition for a Writ of Certiorari. (App 57).

QUESTION PRESENTED

In a state court murder trial which arose out of a stabbing incident in which the Defendant fled from the scene and was not apprehended until more than two weeks later, were De-

fendant's constitutional rights violated by the prosecutor's cross-examination and comments to the jury concerning the Defendant's actions prior to his arrest?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment V, (in pertinent part):

> "No person . . . shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law . . . ."

United States Constitution Amendment XIV, § 1, (in pertinent part):

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

MCLA 750.316; MSA 28.548:

> "All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary, larceny of any kind, extortion or kidnapping, shall be murder of the first degree and shall be punished by solitary confinement at hard labor in the state prison for life."

STATEMENT OF THE CASE

On August 13, 1974 Doyle Redding was stabbed to death by Petitioner Dennis Jenkins (hereinafter generally referred

to as Defendant). Following the stabbing, Defendant fled from the scene and was not apprehended until more than two weeks later, when he turned himself in. Petitioner was charged with first degree murder, but was convicted by a jury of the lesser included offense of manslaughter and was sentenced to a term of 10 to 15 years imprisonment. Respondent Warden (hereinafter generally referred to as the state) accepts as accurate the summaries of witnesses' testimony which are contained on pages 2-5 of the Brief for Petitioner. For purposes of this appeal, suffice it to say that in the course of Defendant's state court trial the prosecutor cross-examined him as to his actions following the stabbing incident, and particularly as to whether Defendant had reported the stabbing incident to anyone during the two-week period between the stabbing and his arrest. During closing argument the prosecutor suggested to the jury that Defendant might have been using that time to "line up" defense witnesses and to discuss their potential testimony with them. Most of the relevant portions of the cross-examination and arguments of counsel are reproduced on pages 8-12 of the Brief for Petitioner.

SUMMARY OF ARGUMENT

At trial Defendant made no objection on constitutional grounds to the prosecutor's cross-examination and jury argument regarding the Defendant's flight from the scene of the crime and subsequent failure to report the incident to the police for more than two weeks. Because of this failure to object, Defendant is precluded, in this habeas corpus proceeding, from raising the issue.

Assuming that Defendant may raise the issue, it is apparent that the Fifth Amendment prohibition against compelled self-incrimination was not violated by the prosecutor's actions because the evidence of which Defendant complains was not,

in the sense of the Fifth Amendment, testimonial in nature and was not compelled. The Fifth Amendment does not preclude admission of voluntary actions and statements and the circumstances of this case indicate that Defendant's flight from the scene of the crime and subsequent failure to report the incident were entirely voluntary and uncoerced.

The admission of evidence regarding Defendant's flight from the scene and subsequent failure to report the stabbing incident did not violate his right to due process and a fundamentally fair trial. Unlike the silence upon which the prosecutor impermissibly commented in *Doyle* v *Ohio*, 426 US 610 (1976) Defendant's actions in this case were not "insolubly ambiguous." Evidence of Defendant's actions was of a type which has historically been admissible in criminal proceedings, had significant probative value (particularly as to his credibility) and minimal prejudicial effect since Defendant offered to the jury his own explanation for his actions.

Even if the prosecutor's actions are somehow deemed to have violated Defendant's constitutional rights, any such violation was harmless beyond a reasonable doubt since by its manslaughter verdict the jury obviously rejected the prosecution's charge that the killing was committed with intent and premeditation and accepted the Defendant's story of a confrontation and struggle between himself and the deceased.

ARGUMENT

I.

DEFENDANT'S FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION WAS NOT VIOLATED BY THE PROSECUTOR'S CROSS- EXAMINATION AND JURY ARGUMENT CONCERNING DEFENDANT'S FLIGHT FROM THE SCENE OF THE STABBING AND FAILURE TO TURN HIMSELF IN FOR TWO WEEKS.

After stabbing the victim, Defendant Jenkins fled from the scene and remained in concealment for more than two weeks until he turned himself in to the Mayor of Detroit, with much attendent publicity. At trial he claimed the stabbing had been done in self-defense and on cross-examination acknowledged the two-week delay in reporting the incident to the police. App 34. In closing argument, the prosecutor suggested to the jury that the Defendant might have used this two-week period to line up witnesses who would support his story that there had been a struggle before the stabbing. Under these circumstances the State submits that the Fifth Amendment privilege against compelled self-incrimination is simply inapposite and that the prosecutor's actions violated none of Defendant's constitutional rights.

It must first be noted that although Defendant now objects on constitutional grounds to the prosecutor's cross-examination and jury argument, no objection on these grounds was made at trial. Defense counsel did object to a portion of the cross-examination on the grounds of relevancy (App 33) and did object to a portion of the jury argument on the ground that it "is an improper inference from the testimony" (App 43) but it is conceded at page 12 of Defendant's brief in this

Court that no constitutional objections were made at trial. Defendant also acknowledges that it is the general rule in Michigan that preservation of a question for appellate review requires timely objection or a motion in the trial court (Petitioner's brief page 12). The existence of such a contemporaneous objection requirement is in fact included within the Michigan General Court Rules, GCR 1963, 507.5:

> "Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time of the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefore; and if a party has no opportunity to object to a ruling or order at the time it is made, the absence of the objection does not thereafter prejudice him.'"

Pursuant to this Michigan requirement, it was incumbent upon the Defendant to make his objection on constitutional grounds at the time of the prosecutor's actions which he now attempts to challenge and his failure to do so precludes him from raising the issue now. See *Schmerber* v *California*, 384 US 757, 765 fn 9 (1966).

In *Francis* v *Henderson*, 425 US 536 (1976) and *Wainwright* v *Sykes*, 433 US 72 (1977) this Court held that considerations of comity and federalism require that recognition be given to a state contemporaneous objection requirement and, where a defendant has failed to make a timely objection and has not demonstrated cause for that failure and actual prejudice, he is thereafter precluded from bringing that challenge in a federal habeas corpus proceeding. In the present case it is conceded that Michigan has a contemporaneous objection rule and that Defendant did not make a timely challenge to the prosecutor's actions on the constitutional grounds which he

now seeks to assert. Additionally, defendant has made no showing of any cause for this failure to object and has demonstrated no actual prejudice and therefore the State submits that he is precluded from making that challenge now.

Throughout the brief for Defendant the Fifth Amendment privilege is characterized as a "right to remain silent." While this may be a convenient shorthand reference, it fails as a complete explication of the boundaries of the privilege. The Fifth Amendment does not prohibit the prosecution's use of all statements or silence of a defendant; the *sine qua non* of the Fifth Amendment privilege is protection against use of *compelled* testimony. United States Const Am V provides in pertinent part:

> "No person . . . shall be compelled in any Criminal Case to be a witness against himself . . . ."

Under the circumstances of this case the State submits that the Defendant's actions (flight from the scene of the stabbing and failure to report the incident for two weeks) are not testimonial, and certainly were not compelled.

Although this case involves a state prosecution, the Fifth Amendment privilege is applicable in such proceedings, *Malloy* v *Hogan*, 378 US 1, 8 (1964):

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent *unless he chooses to speak in the unfettered exercise of his own will*, and to suffer no penalty . . . for such silence." (emphasis added).

It is axiomatic that not all incriminating evidence given by a defendant is barred by the Fifth Amendment privilege. In

order to invoke the privilege, there must be a threshhold determination that a particular communication was testimonial in nature. This requirement was recently discussed by this Court in the context of upholding enforcement of summonses served by the Internal Revenue Service on taxpayers' attorneys, directing the attorneys to produce documents possessed by the taxpayers. Although the Fifth Amendment privilege as it pertains to the production of documents involves somewhat different considerations than in the instant case, the following discussion is relevant, *Fisher* v *United States*, 425 US 391, 408 (1976):

> "It is also clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating. We have, accordingly, declined to extend the protection of the privilege to the giving of blood samples, *Schmerber* v *California*, 384 US 757, 763-764, 16 L Ed 2d 908, 86 S Ct 1826 (1966); to the giving of handwriting exemplars, *Gilbert* v *California*, 388 US 263, 265-267, 18 L Ed 2d 1178, 87 S Ct 1951 (1967); voice exemplars, *United States* v *Wade*, 388 US 218, 222-223, 18 L Ed 2d 1149, 87 S Ct 1926 (1967); or the donning of a blouse worn by the perpetrator, *Holt* v *United States*, 218 US 245, 54 L Ed 1021, 31 S Ct 2 (1910)." (emphasis in original)

In the present case, it is not at all evident that the Defendant's actions were testimonial in sense of the Fifth Amendment. While the acts of flight from the scene of a crime and failure to report the stabbing incident undoubtedly have some communicative aspects in that they have evidentiary value, those actions are certainly far different in character than traditional tesimony from a witness stand. The situation in the instant case is somewhat like that which existed in *California*

v *Byers*, 402 US 424 (1971) in which this Court upheld a California statute which required the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address. This Court concluded that compelling such information did not violate the Fifth Amendment privilege and, in an opinion of four members who had concurred in the result it was said that the disclosure of name and address is "an essentially neutral act," 402 US at 432, which was not testimonial since it "identifies but does not by itself implicate anyone in criminal conduct," 402 US at 434. The same four members of the Court also agreed with the following statement, 402 US at 434:

> "There is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement."

So, too, in the instant case. The effect of the prosecutor's cross-examination and jury argument did not directly implicate Defendant in the commission of a crime; rather it merely undermined his credibility by pointing out to the jury that he had not disclosed his identity to police officers investigating the commission of a crime.

Even if Defendant's actions of fleeing the scene of the stabbing and failing to report the incident to the police for two weeks are considered testimonial, they were in no sense "compelled" and therefore no violation of the Fifth Amendment privilege occurred.

In almost any case involving an assertion of Fifth Amendment privileges, it is necessary to discuss the very prominent case of *Miranda* v *Arizona*, 384 US 436 (1966). There this Court held that before statements obtained from an individual who is subjected to custodial police interrogation are admissible, the individual must first be warned that he has a right

to remain silent, that any statement he does make may be used as evidence against him and that he has a right to the presence of an attorney, either retained or appointed. While the *Miranda* decision is itself not controlling in the present case because there was no custodial interrogation (defined in *Miranda*, 384 US at 444, as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way"), much of the Court's Fifth Amendment analysis is relevant to the instant case. The underlying basis for the *Miranda* decision was this Court's conclusion that custodial interrogation necessarily involves inherent compulsion. Any statements made in such an inherently compelling atmosphere are presumptively obtained in violation of the Fifth Amendment privilege and therefore, "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 384 US at 458. For this reason the Court enunciated a set of procedures which the police must follow in order to advise individuals of their consitutional rights.

With respect to the instant case, it must be noted that the *Miranda* court specifically stated that voluntary statements are admissible, 384 US at 478:

> "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. * * * There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. *Volunteered statements of any kind are not barred by the Fifth Amendment* and their admissibility is not affected by our holding today." (emphasis added).

The Court went on to say that *Miranda* is not intended to hamper the traditional function of police officers in investigating crime, 384 US at 477-478:

> "Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."

In enunciating the Fifth Amendment standard for determining when compulsion has occurred, which the *Miranda* Court cited *Bram* v *United States*, 168 US 532, 549 (1897):

> "The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, *the accused was not involuntarily compelled to make a statement when but for the improper influences he would have remained slient.* . . ." *Miranda* v *Arizona, supra*, 384 US at 462 (emphasis added).

In the present case there were no "improper influences" which "involuntarily compelled" Defendant Jenkins to flee the scene of the stabbing and remain in hiding for more than two weeks. To the contrary, there were no compelling law enforcement influences acting upon him at all and his actions were entirely voluntary.

In *United States* v *Washington*, 431 US 181 (1977) the Court reemphasized that compulsion was the touchstone of the Fifth Amendment privilege. There the defendant had testified at a grand jury regarding a motorcycle theft. He had been fully warned of his rights, but was not warned of possible indictment. He was subsequently indicted and at trial the court granted a motion to suppress the grand jury testimony, but this Court reversed and held that the grand jury testimony could be used because it was not compelled, 431 US at 186-188:

> ". . . it is also axiomatic that the Amendment does not automatically preclude self-incrimination, whether spontaneous or in response to questions put by government officials. • • • Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. • • • Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions. Accordingly, unless the record reveals some compulsion, respondent's incriminating testimony cannot conflict with any constitutional guarantees of the privilege.
>
> "The Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions. • • • The constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony. The test is whether, considering the totality of the circumstances, the free will of the witness was overborne." [citations and footnotes omitted, emphasis in original].

Here, Defendant Jenkins' actions of flight and subsequent concealment had evidentiary value as an incriminating admission, at least by inference, relevant to his credibility and possible guilty knowledge. Most importantly for Fifth Amendment purposes, there is no evidence in this record which

would even permit an inference that Defendant's actions were the result, in the words of the *Washington* Court, of his free will being overborne.

In *Michigan* v *Tucker*, 417 US 433 (1974) the defendant was arrested and interrogated before the *Miranda* decision issued, but was given all of the warnings required by *Miranda* except notice that he had a right to appointed counsel. The defendant stated that he did not want an attorney and went on to name an alibi witness who later supplied a story to police discrediting the defendant's story. At trial the defendant's statements were excluded but the witness' statements were admitted and this Court upheld the conviction, holding that the evidence derived from the police interrogation was admissible. The Court held that *Miranda* applied to the trial, but that the police conduct did not deprive the defendant of his Fifth Amendment privilege because there was no compulsion and the defendant's statements were voluntary. The police conduct did violate the *Miranda* prophylactic rules, but the deterrent purposes of the exclusionary rule would not be served by excluding the testimony because there was no willful or negligent conduct on the part of the police to be deterred and the evidence was not untrustworthy. The Court said that the Fifth Amendment privilege applied where there has been "genuine compulsion of testimony" 417 US at 440 and also stated, 417 US at 448, "Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion since the clause provides only that a person shall not be *compelled* to give evidence against himself." (emphasis in original).

The fact that voluntary statements are admissible against a defendant was further demonstrated by this Court's per curiam opinion in *Oregon* v *Mathiason*, 429 US 492 (1977) in which the defendant made incriminating statements in response to questions from a police officer, but the questioning

took place in a context where his freedom to depart was not restricted in any way. The state court had held that the questioning took place in a "coercive environment", but this Court held that to be insufficient to invoke the *Miranda* protections, 429 US at 495:

> "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect."

Schneckloth v *Bustamonte*, 412 US 218 (1973) involved a consent search of a car in which stolen checks were found. The defendant was convicted, but in subsequent habeas corpus proceedings the Court of Appeals granted him relief, holding that the state must demonstrate that consent to the search was uncoerced and that it was given with the understanding that consent could be withheld. This Court reversed and held that consent searches are governed by the traditional test of voluntariness as determined by examination of the totality of all the surrounding circumstances and that there was no absolute requirement that the police inform the subject of a right to refuse the consent search. In reaching that conclusion, the Court determined that the considerations underlying the *Miranda* decision are simply inapplicable because consent searches do not normally involve any inherently coercive tactics, 412 US at 247:

> "Indeed, since consent searches will normally occur on a person's own familiar territory, the specter of incom-

> municado police interrogation in some remote station house is simply inapposite. There is no reason to believe, under circumstances such as are present here, that the response to a policeman's question is presumptively coerced; and there is, therefore, no reason to reject the traditional test for determining the voluntariness of a person's response. *Miranda*, of course, did not reach investigative questioning of a person not in custody, which is most directly analagous to the situation of a consent search and it assuredly did not indicate that such questioning ought to be deemed inherently coercive."

From the foregoing cases we conclude that the admission of evidence concerning a defendant's voluntary actions prior to his being placed in custody does not violate the Fifth Amendment privilege against compelled self-incrimination. In the instant case, Defendant complains of the prosecutor's cross-examination and jury argument as to his flight from the scene of the stabbing incident and his failure to report the incident for more than two weeks. On the record of his case, however, there is no indication that Defendant's free will was in any way overcome or that the actions of the Defendant were anything but voluntary. There was no actual compulsion since there was no police involvement at all and, as indicated by both *Miranda* and subsequent cases including *Schneckloth*, police investigation of crime does not involve any inherently coercive aspects. Defendant's actions were completely voluntary on his part and therefore the Fifth Amendment privilege against compulsory self-incrimination simply does not come into play and evidence as to the Defendant's actions was admissible. The State does not assert any constitutional duty on the part of the Defendant to turn himself in to the police after the stabbing incident, but we do assert that he had no constitutional right to be free from cross-examination and prosecutorial comment as to actions which are not compelled in the

Fifth Amendment sense. Contrary to the assertion in Defendant's brief page 22, the State does not suggest that Fifth Amendment rights arise only upon arrest; we merely submit that where there has been no compulsion, there is no violation of the Fifth Amendment privilege. The State does not deny the Defendant enjoyed the benefits of the Fifth Amendment privilege of self-incrimination even before his arrest, but we assert that admission of evidence pertaining to his voluntary actions does not violate his constitutional rights.

Acceptance of Defendant's position in this case would require the Court to hold that the prosecution is constitutionally prohibited from introducing evidence regarding a defendant's voluntary actions or statements occurring prior to his arrest and receipt of the *Miranda* warnings. Adoption of that position would deal a moral blow to legitimate police investigative practices. Indeed, the potential effects of such a rule are virtually incalculable. If all of a defendant's voluntary extra-judicial actions and statements are inadmissible because of the Fifth Amendment privilege, one can only speculate as to the drastic reduction in the number of otherwise well-founded prosecutions which would occur. The rule which Defendant would have this Court adopt is completely unwarranted either by prior cases or generally recognized Fifth Amendment principles. Evidence of an individual's voluntary statements and actions has historically been admissible, assuming it meets other evidentiary standards of relevancy, materiality, etc. If, as in this case, there has been no coercion, no improper police procedures, and if the actions or statements are in fact voluntary as determined by examination of the totality of circumstances there can by definition be no violation of the Fifth Amendment prohibition against *compelled* self-incrimination and there is no principled basis for excluding such evidence.

II.

THE DEFENDANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED AT HIS STATE COURT TRIAL BY THE PROSECUTOR'S CROSS-EXAMINATION AND JURY ARGUMENT RELATING TO THE FACT THAT DEFENDANT FLED FROM THE SCENE AND WAITED MORE THAN TWO WEEKS AFTER THE STABBING INCIDENT TO TURN HIMSELF IN TO THE AUTHORITIES.

The State has argued that under the circumstances of the instant case no violation of Defendant's Fifth Amendment privilege occurred. Even if it could be said, however, that Defendant's actions of fleeing the scene of the stabbing and waiting more than two weeks before turning himself in were within the scope of his Fifth Amendment privilege, it does not necessarily follow that the prosecutor's cross-examination and argument to the jury were constitutionally impermissible. In *Raffel* v *United States* 271 US 494 (1926), a defendant who took the witness stand and denied making a statement attributed to him by a prosecution witness was cross-examined concerning the fact that at a previous trial he had declined to testify as a witness on his own behalf. This Court found no violation of the Fifth Amendment privilege, holding that a defendant who takes the stand on his own behalf does so as any other witness and may be cross-examined as to the facts in issue. Because cross-examination as to the defendant's earlier silence might have a bearing on his credibility and on the truth of his own testimony in chief, this Court concluded that the questioning for impeachment purposes was proper.

There is no contradiction between *Raffel* and this Court's subsequent decision in *Griffen* v *California*, 380 US 609 (1965) which prohibits the prosecution's use of evidence concerning

a defendant's silence in its case in chief. In that case a defendant asserted the Fifth Amendment privilege in the course of the trial and this Court held that comment on his refusal to testify had the effect of penalizing the exercise of the privilege and so was impermissible. In *Raffel*, however, as in the instant case, the defendant's prior silence was not used as affirmative evidence of guilt, but merely for impeachment purposes. *Raffel* was distinguished on its facts in *Grunewald* v *United States*, 353 US 391 (1957) in which this Court held, in the exercise of its supervisory powers, that impeachment of the defendant by his prior silence at a grand jury proceeding was impermissible because on the facts of that case the prior silence was not in fact inconsistent with his assertion of innocence in the criminal trial. In reaching its decision, this Court noted that the determination of inconsistency was ordinarily a matter of the trial court's discretion and acknowledged the elementary rule of evidence that prior inconsistent statements may be used to impeach the credibility of a witness, including a criminal defendant, 353 US at 418. The *Grunewald* decision did not overrule *Raffel* and, at least by inference, supports the principle that under certain circumstances prior silence may be used to impeach a defendant's credibility.

This principle also finds support in *Harris* v *New York*, 401 US 222 (1971) and *Oregon* v *Hass*, 420 US 714 (1975) which held that voluntary, uncoerced statements taken in violation of the *Miranda* decision were admissible to impeach a defendant's credibility even though they were inadmissible in the case in chief. Additionally, this Court recently held that coerced statements could not be used for impeachment purposes, *New Jersey* v *Portash*, ... US ...., 59 L Ed 2d 501, 99 S Ct .... (1979).

In the present case, evidence of Defendant's prior voluntary actions was admitted only to impeach his credibility, not as substantive evidence of guilt, so even if those prior actions

are deemed to be protected by the Fifth Amendment privilege, the evidence and comment were permissible under *Raffel* and *Harris*. The prosecutor's cross-examination and jury argument did not directly challenge Defendant's self-defense claim, but since that claim was heavily dependent upon Defendant's assertions as to his state of mind, his credibility was at issue. The fact of his flight from the scene and concealment was relevant—although not conclusive—on the issue of his credibility and possible guilty knowledge and thus inconsistent with the claim of self-defense. The question of the admissibility of such evidence is primarily a matter for the trial court's discretion and that determination should not be readily overturned. Unlike *Grunewald* v *United States, supra,* 353 US 391, where this Court exercised its supervisory authority over its own lower court, the present case involves a request for federal habeas corpus from a state court conviction and thus a very strict standard of review is applicable. Relief may be granted only if this Court concludes that constitutional error was committed; mere evidentiary errors which do not result in a fundamentally unfair trial are not sufficient. *Donnelly* v *DeChristoforo,* 416 US 637 (1974).

In the instant case, the state submits that the Defendant's voluntary uncoerced flight from the scene of the crime and failure to turn himself in for more than two weeks do not implicate any Fifth Amendment privilege, and therefore the prosecutor's cross-examination and jury argument are permissible unless it can be said that they amount to a deprivation of due process, depriving Defendant of a fundamentally fair trial. In *Doyle* v *Ohio,* 426 US 610 (1976), this Court concluded that the use for impeachment purposes of a defendant's silence at the time of arrest and after receiving *Miranda* warnings violated due process because under such circumstances silence is "insolubly ambiguous" since it might be nothing more than reliance upon the *Miranda* warnings. In *United States* v *Hale,* 422 US 171 (1975), a case very similar to *Doyle,* this Court

exercised its supervisory authority and concluded that it was prejudicial for a trial court to permit cross-examination of a defendant concerning his silence during police interrogation after receiving the *Miranda* warnings. The Court noted that the "inherent pressures of in-custody interrogation . . . compound the difficulty of identifying the reason for silence" 422 US at 177, and concluded that the probative value of such silence was outweighed by possible prejudicial impact. This Court acknowledged the "basic rule of evidence" which provides that prior inconsistent statements may be used to impeach the credibility of a witness, but apparently felt that under the circumstances of in-custody interrogation after receiving *Miranda* warnings silence was not sufficiently inconsistent with a later explanatory story.

Defendant's actions of flight and concealment amount to more than mere silence and do not suffer from the insoluble ambiguity which was fatal in *Hale* and *Doyle.* That ambiguity derived from the *Miranda* warnings which had been given to the suspects whereas here Defendant Jenkins cannot have relied on such warnings because he was not in custody, was not under arrest, had no contact with police and thus, had not received any *Miranda* warnings. Furthermore, there is nothing in this record from which to infer that Defendant's actions were in any way taken in reliance upon a general understanding of his Fifth Amendment privilege.

The general rule regarding the admissibility of this type of evidence is stated in 2 J. Wigmore, *Evidence,* 3rd Edition, §276, p 111 (1940) as follows:

> "Flight from justice, and its analagous conduct, have always been deemed indicative of a consciousness of quilt.
> • • •

"It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct are admissible as evidence of consciousness of guilt, and thus of guilt itself. . ."

Although the probative value of evidence that an accused fled the scene of a crime has been questioned, see *Wong Sun* v *United States*, 371 US 471, 493, fn 10 (1963), the admissibility of such evidence is well established in Michigan jurisprudence. The rule has been summarized by a noted commentator as follows, 1 Gillespie, *Michigan Criminal Law and Procedure*, 2nd Edition, §420, pp 639-640 (1979):

"Conduct of the accused, the logical inference from which would tend to show a consciousness of guilt, is admissible. Evidence of the conduct of a defendant, such as fabrication of false statements to exculpate him, attempts to mislead the prosecution, conceal his guilt, suppress testimony, procure perjured testimony, or acts indicating that alleged conspirators were devising means to avoid exposure, is admissible. • • •

"Evidence of flight from the place of the crime or from the state is admissible, and although flight may be as consistent with innocence as with guilt, it is for the jury to say whether under all of the circumstances of the case it is evidence of guilt." (footnotes omitted)

The foregoing statement finds support in numerous Michigan cases including *People* v *Cammarata*, 257 Mich 60, 240 NW 14 (1932); *People* v *Lewis*, 264 Mich 83, 249 NW 451 (1933); *People* v *Ranes*, 58 Mich App 268, 227 NW 2d 312 (1975); and *People* v *Casper*, 25 Mich App 1, 7, 180 NW 2d 906 (1970) where it is said:

"Michigan authority appears uniform in holding that actions by the defendant such as flight to avoid lawful arrest, procuring perjured testimony and attempts to destroy evidence, while possibly as consistent with innocence as with guilt, may be considered by the jury as evidence of guilt."

It should be noted that although under Michigan law the prosecutor could have introduced evidence of Defendant Jenkins' flight from the scene of the stabbing and failure to turn himself in for more than two weeks as substantive evidence of guilt, that evidence was only adduced upon cross-examination of the Defendant and was only used to attack Defendant's credibility. Under these circumstances any prejudicial effect on the Defendant was minimal because he had the opportunity to explain his conduct to the jury and, in fact, did so, App 37-38:

"Q. Was there any special reason why you went over to the Mayor's Bodyguard and to the Mayor and everything else to surrender yourself instead of going to the Police the same day when this happened, instead of waiting two weeks to go to the Mayor?

"A. Yes, it is.

"Q. What is the reason?

"A. Because I was afraid. Judge Gardner just had gave me probation.

"Q. You were afraid of whom?

"A. I was afraid what I had happened."

Such an explanation is not entirely unreasonable and in the instant case it appears that the jury must have given some credence to Defendant's claim regarding his state of mind

since it rejected the prosecutor's charge that the killing was committed with intent and premeditation and instead convicted him only of manslaughter which was defined in the court's instructions, in part, as a killing "committed under the influence of passion or in heat of blood produced by an adequate provocation and before a reasonable time has elapsed for the blood to cool." TT 337-338.

Evidence as to Defendant's flight and failure to turn himself in is of a type which has historically been admissible in criminal prosecutions. While not conclusive of guilt, such actions on the part of a defendant are probative as to consciousness of guilt and credibility, particularly where, as here, a defendant asserted self-defense and thus his credibility and guilty knowledge are extremely relevant. It cannot be doubted that the Defendant's actions were entirely voluntary on his part and because there is no suggestion of improper police procedures —indeed there was no police involvement of any kind— there can be no doubt as to the trustworthiness of the evidence. Under the circumstances of the present case it cannot fairly be said that the cross-examination and jury argument of which Defendant complains resulted in a fundamentally unfair trial.

III.

ANY CONSTITUTIONAL ERROR IN THE PROSECUTOR'S CROSS-EXAMINATION OF THE DEFENDANT OR IN THE CLOSING ARGUMENT TO THE JURY WAS HARMLESS BEYOND A REASONABLE DOUBT.

In *Chapman* v *California*, 386 US 18 (1967) this Court held that in certain circumstances constitutional error involving adverse comment upon a defendant's failure to testify in a state criminal trial may be harmless. Although under the circumstances of that case this Court concluded that the error

was not harmless, it enunciated the standard to be applied in making such determinations, 386 US at 24:

> ". . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

Although the instant case, like *Chapman*, involves allegations of improper prosecutorial argument, the two cases are distinguishable since they involve significant quantitative and qualitative differences.

An appendix to the *Chapman* opinion, 386 US 26-42, contains the argument and comments by the prosecutor on the failure of the defendants to take the witness stand. This 16-page excerpt from the prosecutor's argument was characterized as "continuously and repeatedly" impressing upon the jury that the defendants had, by their silence, "served as irrefutable witnesses against themselves" and that all inferences from the facts in evidence had to be drawn in favor of the state. 386 US at 25. This "machine gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless", 386 US at 26, is a far cry from the much more limited and restrained action by the prosecutor in the instant case. Here the prosecutor's cross-examination consists merely of neutral questioning of the Defendant regarding his actions between the time of the stabbing and his arrest more than two weeks later and the challenged comments to the jury consist only of suggestions of lessened credibility because of the delay. In this context it must recalled that a principal defense strategy involved argument to the jury that the prosecution witnesses had not presented a completely accurate picture of the stabbing incident (App 23) and that the defense, by diligent effort, came up with additional witnesses who testified to the true events. (App 48). Thus, the instant circumstances are somewhat akin to the

situation which existed in *Donnelly* v *DeChristoforo*, 416 US 637 (1974) where this Court found no deprivation of due process with respect to an allegedly improper prosecutorial argument. There, this Court noted that the argument was perhaps offered to rebut an argument by defense counsel and, after viewing the totality of circumstances, concluded that the isolated passages of the prosecutor's argument which were challenged did not reach proportions which "may profoundly impress a jury and may have a significant impact on the jury's deliberations." 416 US at 646.

In the instant case, Petitioner was charged with first degree murder which, under Michigan law, includes the elements of malice (intent to kill) and premeditation. The jury was properly instructed on the charge of first degree murder, TT 336-337, as well as the lesser included offense of second degree murder, TT 337, the elements of which are identical to those of first degree murder with the absence of premeditation. Defendant did not dispute his involvement in the stabbing or the homicide itself, but claimed self-defense and the jury was properly instructed as to this also, TT 339-340:

> "The Defendant has interposed a plea of Self-Defense, and under certain circumstances this is a good defense. The law gives every person the right to protect himself from an unlawful assault. Where an assault is made, the right to resist exists; but the resistance must be in proportion to the danger which is apprehended. It is not every assault that would justify a person in resisting by using a deadly weapon. Self-defense, in proper cases, is the right of every person, but it will not justify the taking of human life unless the Jurors are satisfied from the testimony; first, that the Defendant was not the aggressor in bringing on the difficulties; second, that there existed, at the time of the stabbing, in his mind, a present and impending necessity to stab in order to save himself from death or some great bodily harm; third, that there must have been no way open whereby he could have retreated, as it appeared to him at the time, to a place of safety and thus have avoided the conflict.
>
> "If, however, the person assailed honestly believes his life in danger, or, that he may suffer serious bodily harm, he has a right to resist, even to taking the life of his assailant. If the person assailed is to be judged by the circumstances and conditions as they honestly appeared to him at the time, it is not necessary to his defense that the danger should have been actual or real, or that the danger should have been impending and immediately about to follow. The actions and conduct of the Defendant are to be judged from the circumstances as they appeared to him at the time. One who is suddenly attacked by an adversary is not held to fine distinctions of judgment as to what is in the mind of his adversary, or, what his adversary is about to do, or to how much force it is necessary for him to use to protect his life or his person from serious bodily harm. It is for you to say, from all of the evidence in this cause, whether the Defendant honestly believed he was in danger of losing his life, or in danger of great bodily harm, and that it was necessary for him to stab the deceased to save himself from such apparent and threatened danger."

The jury rejected the prosecution's theory of murder as well as the Defendant's claim of self-defense and convicted him of manslaughter, the elements of which were defined for the jury as follows, TT 337-339:

> "The crime of murder may be reduced to Voluntary Manslaughter if the killing be committed under the influence of passion or in heat of blood produced by an adequate provocation and before a reasonable time has

elapsed for the blood to cool. And manslaughter is distinguished from murder in that with Voluntary Manslaughter:

"First, the mind or reason of the Defendant is at the time of the act, disturbed or clouded by mental or emotional excitement to an extent which might make an ordinary person likely to act rashly or without due deliberation or reflection and from passion, rather than judgment.

"Second, the cause of such disturbance must be something which would cause ordinary persons to act rashly. The law does not state what things are sufficient to prove such a reaction. Anything the natural tendency of which would be to produce such a state of mind in ordinary persons is sufficient.

"Third, the killing must result from such provocation or passion. That is, the killing must have occurred before a reasonable time had elapsed for the blood to cool and reason to resume its control. No precise time can be laid down. The test is whether or not a reasonable time had elapsed under these particular circumstances.

"Murder must be understood within the framework of the area called 'homicide'. Homicide has been defined as the killing of a human being by another human being, which in turn can be criminal or non-criminal. Non-criminal Homicide is called justified or excused. Justification or excuse takes many forms, but is commonly encountered in the form of self-defense or accident. The People in a murder case must exclude justification or excuse beyond a reasonable doubt in order for you to return a verdict of Guilty."

By its verdict, the jury clearly rejected the prosecution's theory that the killing was done with intent and with premeditation and also rejected the Defendant's self-defense plea, perhaps because the facts, even according to the testimony of defense witnesses, demonstrated that Defendant could have retreated and thus avoided the conflict, but did not do so.

The cross-examination and comments by the prosecutor which are here challenged relate merely to the timing of Defendant's arrest and the suggestion of lessened credibility because of the delay. The prosecutor's actions do not directly challenge the truth of Defendant's self-defense story and thus could have had no bearing on the jury's ultimate verdict of manslaughter. Given the Defendant's version of the evidence concerning the confrontation between him and the deceased, and given the jury's rejection of the prosecutor's arguments regarding intent to kill and premeditation, it cannot reasonably be said that the challenged cross-examination and jury argument contributed to Defendant's conviction of manslaughter and therefore any constitutional error in the prosecutor's arguments must be acknowledged to have been harmless beyond a reasonable doubt.

Although the brief of defendant refers to the prosecutor's cross-examination of certain defense witnesses, he does not appear to assert that such questioning violated any of his constitutional rights. Nor could he make such an assertion, since the only issue raised is the petition for a writ of certiorari dealt with his own cross-examination. (Brief for Defendant, pp 31, 32).

CONCLUSION AND RELIEF SOUGHT

The defendant's voluntary actions of fleeing from the scene of the stabbing and failing to report the incident to the police for more than two weeks do not fall within the scope of the Fifth Amendment privilege against compelled self-incrimination and therefore the prosecutor's cross-examination and comment to the jury on these issues did not violate Defendant's rights. Because the Defendant's voluntary actions were not taken in reliance upon any constitutional privilege, the "insoluble ambiguity" found in *Doyle* v *Ohio* is not present in the instant case. Evidence as to the defendant's flight and subsequent actions is of a type which has historically been admissible in criminal proceedings and because of its significant probative value and minimal prejudicial effect it cannot be said that admission of the evidence violated defendant's due process right to a fundamentally fair trial. Even if the prosecutor's actions are somehow deemed to have violated defendant's constitutional rights, any such error must be deemed to be harmless beyond a reasonable doubt because by the jury's verdict it is clear that they rejected the prosecution's theory of an intentional and premeditated kill and accepted, at least in part, defendant's claim that the killing had occurred after a confrontation and struggle between himself and the deceased.

For the foregoing reasons Respondent Charles Anderson, Warden, State Prison for Southern Michigan at Jackson, Michigan urges this Court to affirm the judgment of the Court of Appeals which in turn affirmed the judgment of the District Court and denied the writ of habeas corpus.

Respectfully submitted,

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